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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MARCH 16, 2018

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Collateral Estoppel and Res Judicata—res judicata—not supported by findings—alternative conclusion sufficient—Where the findings of fact in an insurance dispute did not support the trial court's conclusion of law regarding *res judicata*, the trial court's alternative conclusion of law—that plaintiff engaged in undue and unreasonable delay—supported its judgment. **Greenshields, Inc. v. Travelers Prop. Cas. Co. of Am., 25.**

CRIMINAL LAW

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Criminal Law—deterring witness by threats—letters—Defendant argued that the trial court improperly denied his motions to dismiss charges of deterring a witness by threats. Excerpts from two letters from defendant to the victim that were

specifically referenced in the indictment, along with other letters, included language that a reasonable juror could interpret as threatening or attempting to threaten the victim to prevent her from appearing in court. **State v. Barnett, 101.**

Criminal Law—deterring witness by threats—letters—not received by victim—In a prosecution for deterring a witness, the State presented ample evidence of threats made by defendant to inflict bodily harm against a prospective witness against him. The fact that the witness and her daughter did not receive those letters was irrelevant because the crime of deterring a witness may be shown by actual intimidation or attempts at intimidation. **State v. Barnett, 101.**

Criminal Law—deterring witness by threats—witness summoned—indictment number of underlying case—surplusage—In a prosecution for deterring a witness by threats, the indictment's allegation of a specific indictment number for the underlying case was surplusage which the State did not have to prove where the indictment charged that the witness had been summoned. **State v. Barnett, 101.**

DIVORCE

Divorce—alimony—attorney fees—In a divorce action seeking alimony, equitable distribution, and attorney fees, a portion of the order denying plaintiff's claim for attorney fees was vacated and remanded where the portion of the order denying alimony was vacated. **Carpenter v. Carpenter, 1.**

Divorce—alimony—dependent spouse--findings—The trial court's findings in a divorce and alimony case were not sufficient to support its conclusions that plaintiff was not a dependent spouse and thus was not entitled to alimony. The trial court failed to determine which, if any, of plaintiff's expenditures were reasonable in light of her accustomed standard of living during the parties' marriage, and failed to engage in the necessary comparison of those reasonable expenses to a correct calculation of plaintiff's income. **Carpenter v. Carpenter, 1.**

Divorce—alimony—supporting spouse—findings—A portion of a trial court order denying plaintiff's alimony claim was vacated and remanded for findings to determine whether plaintiff is a dependent spouse and whether defendant is a supporting spouse. Just because one party is a dependent spouse does not automatically mean that the other party is a supporting spouse. To be deemed a "supporting spouse," as defined in N.C. Gen. Stat. § 50-16.3A, the party must be either substantially depended upon or substantially relied upon for maintenance and support by the dependent spouse. **Carpenter v. Carpenter, 1.**

Divorce—equitable distribution—attorney fees—not supported by record—The trial court erred by awarding attorney fees to defendant in an equitable distribution claim. As a general rule, attorney fees are not recoverable in an equitable distribution claim. Neither the record in this case nor the trial court's findings reveal any indication at all of either of the two statutory instances in which attorney fees may be awarded in an equitable distribution claim. **Eason v. Taylor, 16.**

Divorce—equitable distribution—failure of plaintiff to settle—The trial court erred in an equitable distribution action where it appeared to base the determination that equitable distribution was not warranted, as well at its award of attorney fees, on pro se plaintiff's failure to negotiate a settlement. As a matter of law, it does not matter what, if anything, defendant offered plaintiff to settle the equitable distribution claim. Furthermore, in this case, the trial court in a bench trial did not

DIVORCE—Continued

disregard the incompetent evidence that the case was not settled but explicitly based its determination that equitable distribution was "not warranted" at least in part upon the finding that "this matter could have been settled." **Eason v. Taylor, 16.**

Divorce—equitable distribution—findings and conclusions—distribution of property and debt—The trial court in an equitable distribution action did not follow the mandates of N.C.G.S. § 50-20 by failing to make the required findings of fact, conclusions of law, and distribution of marital property and debt. Where the parties have presented evidence of the marital and divisible property and debts and separate property, as they did here, and the trial court has even acknowledged that the equitable distribution claim was properly before the court and that marital and separate property and debt existed, there was simply no legal rationale for a conclusion that equitable distribution was "not warranted." **Eason v. Taylor, 16.**

Divorce—equitable distribution—mostly debt—worthy of distribution—The trial court erred in an equitable distribution action by seeming to consider the fact that the parties had mostly debt as rendering the claim unworthy of distribution. The trial court must address the classification, valuation, and distribution of the property and debt, regardless of value. The trial court simply took the parties at their word that each would pay certain debts, without actually classifying, valuing, and distributing the debts by order, so that each party may have some possibility of legal recourse if the other should fail to pay. **Eason v. Taylor, 16.**

Divorce—equitable distribution—presumption favoring equal distribution—In an equitable distribution action, the trial court's finding that "[t]he defendant has rebutted the presumption favoring an equal distribution of marital property" did not comply with the mandate of N.C.G. S. § 50-20(c). **Carpenter v. Carpenter, 1.**

Divorce—equitable distribution—status of property—sources of funds rule—In an equitable distribution action, the trial court's findings of fact regarding an investment account were supported by competent evidence, and the trial court's findings support its conclusion of law that part of the account was part separate property, and part marital property. North Carolina recognizes the "source of funds" rule, under which assets purchased with, or comprised of, part marital and part separate funds are considered "mixed property" for equitable distribution purposes. **Carpenter v. Carpenter, 1.**

Divorce—equitable distribution—Uniform Transfers to Minors Account—minor not joined as party—The Court of Appeals vacated the portion of a trial court's equitable distribution order that classified and distributed a Uniform Transfers to Minors Act Account and remanded the action for the trial court to join the minor as a party to the action prior to its reconsideration of the classification and, if appropriate, distribution of this account. **Carpenter v. Carpenter, 1.**

EVIDENCE

Evidence—not offered for admission—cumulative and unnecessary—On appeal from the superior court's order dismissing a foreclosure proceeding, the Court of Appeals rejected the substitute trustee's argument that the superior court erred by excluding an affidavit from evidence. The substitute trustee acknowledged on appeal that neither party expressly sought to admit the affidavit. Even assuming the affidavit was offered for admission, the trial court did not abuse its discretion, as the proponent of the affidavit described it as cumulative and unnecessary. **In re Foreclosure of Herndon, 83.**

INSURANCE

Insurance—findings—supported by evidence—unchallenged findings—In an insurance dispute where there was competent evidence to support challenged findings of fact, and unchallenged findings were presumed correct, the trial court's conclusions of law were proper in light of such findings. **Greenshields, Inc. v. Travelers Prop. Cas. Co. of Am., 25.**

JURISDICTION

Jurisdiction—subject matter—dismissal on other basis—Although plaintiff argued that the trial court erroneously dismissed plaintiff's claim based upon an alleged lack of subject matter jurisdiction, the trial court did not grant defendants' motion to dismiss based on lack of subject matter jurisdiction. **Greenshields, Inc. v. Travelers Prop. Cas. Co. of Am., 25.**

MORTGAGES AND DEEDS OF TRUST

Mortgages and Deeds of Trust—foreclosure by sale—two-dismissal rule—Where two previous actions for foreclosure by sale were voluntarily dismissed and a third action for foreclosure by sale was subsequently filed, the superior court erred by dismissing the third action pursuant to Rule of Civil Procedure 41(a). Each foreclosure petition covered defaults from different time periods—the first covered defaults from November 2007 to November 2009, the second covered those and additional defaults from December 2009 to December 2011, and the third covered those and additional defaults from January 2012 to February 2014. The claims of default and particular facts at issue in each action therefore differed and Rule 41(a)'s two-dismissal rule did not apply. The lender's election to accelerate payment did not bar the subsequent foreclosure actions. **In re Foreclosure of Herndon, 83.**

RAPE

Rape—attempted—evidence not sufficient—The trial court erred by denying defendant's motion to dismiss a charge for attempted first-degree rape of a child where the victim testified to two incidents, one of which occurred on a couch and the other in her bedroom. As to the bedroom incident, she testified that some penetration had occurred, but had told a child abuse evaluation specialist in a recorded interview that she thought there had not been penetration. The State conceded that the video was not admitted as substantive evidence; therefore, while there may have been substantial evidence for the jury to find defendant guilty of rape, there was insufficient evidence to support his conviction for attempted rape based on the bedroom incident. The couch incident would support a conviction for indecent liberties but not for attempted rape. **State v. Baker, 94.**

SEARCH AND SEIZURE

Search and Seizure—traffic stop—probable cause—The trial court's findings of fact support its conclusion that reasonable suspicion existed to stop defendant's vehicle in an opioid possession prosecution, although it was a close case because the observed transaction with in broad daylight in an area not known for drug activity and defendant did not display signs of nervousness. Defendant was known to the trained and experience vice officer who observed the transaction from having been an informant when the vice officer observed defendant and the occupant of another vehicle conduct a hand-to-hand transaction without leaving their vehicles. **State v. Travis, 120.**

SENTENCING

Sentencing—no contact order—person other than victim—Plain statutory language limited the trial court's authority to enter a no contact order protecting anyone other than the victim. The trial court did not have authority under the catch-all provision to enter a no contact order specifically including persons who were not victims of the sex offense committed by defendant. N.C.G.S. §15A-1340.50 consistently and repeatedly refers only to the victim and not to any other person. **State v. Barnett, 101.**

Sentencing—satellite monitoring—registration as sex offender—attempted second-degree rape—A lifetime satellite-based monitoring order and an order requiring registration as a sex offender were reversed and remanded where the trial court erroneously concluded that attempted second-degree rape is an aggravated offense. A conviction for attempted rape does not require penetration and thus does not fall within the statutory definition of an aggravated offense. **State v. Barnett, 101.**

STATUTES OF LIMITATIONS AND REPOSE

Statutes of Limitations and Repose—statute of limitations—not the basis of ruling—Although plaintiff argued that the trial court erroneously determined that the statute of limitations barred plaintiff's claim, the trial court's conclusion of law addressed *res judicata* and did not mention "statute of limitations." It was the bankruptcy court that concluded plaintiff's claims were barred by the statute of limitations. **Greenshields, Inc. v. Travelers Prop. Cas. Co. of Am., 25.**

TERMINATION OF PARENTAL RIGHTS

Termination of Parental Rights—conclusion—failure to provide support—The district court did not err by terminating respondent's parental rights for failure to provide support despite respondent's contention that the trial court's conclusion was erroneous for numerous reasons. While the Department of Social Services (DSS) did not have jurisdiction for a time, it was not divested of custody of the child because the mother's relinquishment of custody specifically gave custody to DSS. The ground of failure to provide support was based upon child support enforcement orders in a different action which were not void. In addition, the district court made findings establishing that respondent failed to pay a reasonable amount of child support even though he had the ability to do so. **In re A.L., 55.**

Termination of Parental Rights—DSS records—basis of testimony—hearsay—business records exception--The trial court did not abuse its discretion by determining that the termination of a mother's parental rights was in the best interests of the children where a portion of the evidence consisted of a social worker testifying from Department of Social Services reports regarding events that occurred before she was assigned to the case. The testimony was admissible under the business records exception to the hearsay rule. **In re C.R.B., 65.**

Termination of Parental Rights—findings—cost of care of juvenile—respondent's failure to pay—In a termination of parental rights case where respondent contended that the Department of Social Services did not produce significant evidence to support its findings independent of void review orders, clear, cogent, and convincing evidence properly before the court supported the findings of

fact necessary to support the court's conclusion of law concerning the reasonable portion of the cost of care for the juvenile. In addition, the district court made findings establishing that respondent- failed to pay a reasonable amount of child support even though he had the ability to do so. **In re A.L., 55.**

Termination of Parental Rights—findings—previous adjudication—In a termination of parental rights case, the district court erred by finding as fact that the child had previously been adjudicated dependent. However, the error was not prejudicial because the district court properly terminated respondent's parental rights on another ground. **In re A.L., 55.**

Termination of Parental Rights—identity of father discovered—unwillingness to pursue reunification—In its order terminating respondent-father's parental rights to his minor child, the trial court did not err by concluding that the child was neglected by respondent at the time of the termination hearing. The identity of the child's father was unknown until paternity tests were performed after the child was adjudicated neglected and dependent. At the termination hearing, a social worker testified that respondent had never met the child, had never provided any support for the child, and had been unwilling to pursue a plan of reunification. Respondent's failure "to provide love, support, affection, and personal contact" to the child supported the trial court's conclusion that respondent's parental rights should be terminated. **In re C.L.S., 75.**

Termination of Parental Rights—on remand—new evidence not received—On appeal from the trial court's order terminating respondent-mother's parental rights to her two children, the Court of Appeals held that the trial court did not abuse its discretion when it did not receive new evidence as to best interest. The Court of Appeals' prior opinion left the decision of whether to receive new evidence in the trial court's discretion, and there was no indication that respondent asked the trial court to receive new evidence on remand. **In re A.B., 35.**

Termination of Parental Rights—order on remand—contradictions—On appeal from the trial court's order terminating respondent-mother's parental rights to her two children, the Court of Appeals rejected respondent's argument that the trial court's order on remand from the Court of Appeals contradicted the oral rendition at the initial hearing and the first order that ultimately resulted from that rendition. Respondent's argument failed to acknowledge that the second order was the result of the Court of Appeals' remand and specific direction to the trial court to make its order internally consistent. **In re A.B., 35.**

Termination of Parental Rights—order on remand—findings of fact—not contradictory—On appeal from the trial court's order terminating respondent-mother's parental rights to her two children, the Court of Appeals rejected respondent's argument that the trial court retained most of its contradictory findings from its first order after the Court of Appeals remanded the case for the court to clarify its findings of fact and conclusions of law. It is not unusual for an order terminating parental rights to include both favorable and unfavorable findings regarding the parent's progress toward reunification with the child. The trial court made numerous findings regarding respondent's progress but ultimately found that the progress was not enough. The trial court's findings supported its conclusions, which supported its ultimate decision to terminate respondent's parental rights. **In re A.B., 35.**

Termination of Parental Rights—order on remand—scope—On appeal from the trial court's order terminating respondent-mother's parental rights to her two children, the Court of Appeals rejected respondent's argument that the trial court exceeded the scope of the remand order from the Court of Appeals to clarify its findings of fact and conclusions of law. Respondent failed to make any argument that the changed facts in the new order were not supported by the evidence. **In re A.B., 35.**

Termination of Parental Rights—order—failure to plainly state standard of proof—On appeal from the trial court's order terminating respondent mother's parental rights to her two children, the Court of Appeals held that the trial court did not err when it only recited the proper standard of proof in finding of fact 13 and failed to affirmatively state in its order that all findings of fact were made pursuant to the proper standard of proof. While it would have been preferable for the trial court to plainly state its standard of proof for all findings of fact, the Court of Appeals concluded that the trial court used the correct standard of proof based on the language in finding of fact 13, the lack of evidence of an erroneous standard, and the oral rendition stating the appropriate standard. **In re A.B., 35.**

Termination of Parental Rights—order—finding of facts—reference to allegations—On appeal from the trial court's order terminating respondent-mother's parental rights to her two children, the Court of Appeals disagreed with respondent's arguments regarding finding of fact 13—that the trial court improperly relied on allegations regarding neglect, failed to make its own independent determinations regarding the allegations, and relied on findings not supported by the evidence. The allegations referenced in finding 13 provided a relevant background for respondent's failure to make reasonable progress; the trial court made an independent determination of the facts and did not simply recite the allegations; and, even assuming finding of fact 13 was insufficient to support termination of respondent's parental rights, there were 69 unchallenged findings of fact that supported termination. **In re A.B., 35.**

Termination of Parental Rights—subject matter jurisdiction—new filing and new summons—A district court re-acquired subject matter jurisdiction over a termination of parental rights case following a voluntary dismissal where the Department of Social Services (DSS) initiated a new action by issuing a new summons and filing a termination petition, and DSS had standing to file the petition due to the mother's relinquishment of custody of the child to DSS. **In re A.L., 55.**

Termination of Parental Rights—subject matter jurisdiction—new filing and new summons—A district court re-acquired subject matter jurisdiction over a termination of parental rights case following a voluntary dismissal where the Department of Social Services (DSS) initiated a new action by issuing a new summons and filing a termination petition, and DSS had standing to file the petition due to the mother's relinquishment of custody of the child to DSS. **In re A.L., 55.**

Termination of Parental Rights—subject matter jurisdiction—voluntary dismissal—Where the Department of Social Services voluntarily dismissed a neglected and dependent juvenile petition after the mother relinquished her parental rights and the district court thereafter entered an order dismissing the matter, concluding that the petition was mooted by the relinquishment, the district court no longer had subject matter jurisdiction over the case and its subsequent custody review orders were void. **In re A.L., 55.**

SCHEDULE FOR HEARING APPEALS DURING 2018

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2018:

January 8 and 22

February 5 and 19

March 5 and 19

April 2, 16 and 30

May 14

June 4

July None

August 6 and 20

September 3 and 17

October 1, 15 and 29

November 12 and 26

December 10

Opinions will be filed on the first and third Tuesdays of each month.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

LOUISE ANNETTE CARPENTER, PLAINTIFF
v.
FRED J. CARPENTER, JR., DEFENDANT

No. COA14-1066

Filed 19 January 2016

1. Divorce—alimony—dependent spouse—findings

The trial court's findings in a divorce and alimony case were not sufficient to support its conclusions that plaintiff was not a dependent spouse and thus was not entitled to alimony. The trial court failed to determine which, if any, of plaintiff's expenditures were reasonable in light of her accustomed standard of living during the parties' marriage, and failed to engage in the necessary comparison of those reasonable expenses to a correct calculation of plaintiff's income.

2. Divorce—alimony—supporting spouse—findings

A portion of a trial court order denying plaintiff's alimony claim was vacated and remanded for findings to determine whether plaintiff is a dependent spouse and whether defendant is a supporting spouse. Just because one party is a dependent spouse does not automatically mean that the other party is a supporting spouse. To be deemed a "supporting spouse," as defined in N.C.G.S. § 50-16.3A, the party must be either substantially depended upon or substantially relied upon for maintenance and support by the dependent spouse.

3. Divorce—alimony—attorney fees

In a divorce action seeking alimony, equitable distribution, and attorney fees, a portion of the order denying plaintiff's claim for

attorney fees was vacated and remanded where the portion of the order denying alimony was vacated.

4. Divorce—equitable distribution—Uniform Transfers to Minors Account—minor not joined as party

The Court of Appeals vacated the portion of a trial court's equitable distribution order that classified and distributed a Uniform Transfers to Minors Act Account and remanded the action for the trial court to join the minor as a party to the action prior to its reconsideration of the classification and, if appropriate, distribution of this account.

5. Divorce—equitable distribution—status of property—sources of funds rule

In an equitable distribution action, the trial court's findings of fact regarding an investment account were supported by competent evidence, and the trial court's findings support its conclusion of law that part of the account was part separate property, and part marital property. North Carolina recognizes the "source of funds" rule, under which assets purchased with, or comprised of, part marital and part separate funds are considered "mixed property" for equitable distribution purposes.

6. Divorce—equitable distribution—presumption favoring equal distribution

In an equitable distribution action, the trial court's finding that "[t]he defendant has rebutted the presumption favoring an equal distribution of marital property" did not comply with the mandate of N.C.G. S. § 50-20(c).

Appeal by plaintiff from order entered 12 March 2014 by Judge Beverly A. Scarlett in Orange County District Court. Heard in the Court of Appeals 22 April 2015.

Wyrick Robbins Yates & Ponton, LLP, by Tobias S. Hampson and K. Edward Greene, for plaintiff-appellant.

Jonathan McGirt, for defendant-appellee.

CALABRIA, Judge.

Louise Annette Carpenter ("plaintiff") appeals from an order denying her claims for alimony and attorneys' fees, and granting an unequal distribution of property in favor of Fred J. Carpenter,

Jr. ("defendant"). We vacate in part and remand the portions of the order denying alimony and attorneys' fees. We affirm in part, vacate in part, and remand for additional proceedings the portion of the order regarding equitable distribution.

I. Background

Plaintiff, a nurse anesthetist, and defendant, an anesthesiologist (collectively, "the parties"), were married on 11 November 1995, and after the parties separated on 30 November 2011, their minor child resided with defendant. During the marriage, plaintiff was employed in various positions, including working for defendant's practice group until 28 February 2010. When plaintiff terminated her employment, she never worked again during the parties' marriage. After the parties separated, plaintiff resumed working as a nurse anesthetist on a contract basis and was paid $250 for her first four hours of work on any given shift, and $65 per hour for additional hours. Plaintiff estimated her earning potential at $40,000 to $50,000 per year. Defendant reported that his income prior to August 2013 included an annual salary from his practice group of $120,000, an additional annual salary from Duke University Medical Center of $15,000, and $94,900 in annual disability payments. In total, defendant earned $229,900 annually.

On 3 June 2011, plaintiff filed a complaint against defendant including claims for divorce from bed and board, post-separation support, alimony, and child custody. Defendant filed his answer on 27 June 2011, which included a counterclaim for custody. Subsequently, their pleadings were amended to add a claim for equitable distribution.

After a trial in Orange County District Court, the Honorable Beverly A. Scarlett found plaintiff's income was in excess of $130,000 per year, concluded that plaintiff was not a dependent spouse, and denied her alimony claim and request for attorneys' fees. For equitable distribution, the trial court found that "an unequal division of property is equitable." Specifically, for the mixed investment fund valued at approximately $1.4 million at the time of the parties' separation, the court determined that after defendant received his separate contributions, 70 percent of the remainder was to be distributed to defendant and 30 percent to plaintiff. On 12 March 2014, the trial court ordered an unequal distribution of the parties' property in favor of defendant. Plaintiff appeals.

II. Alimony

[1] Plaintiff first argues the trial court's findings were insufficient to support its conclusions that she was not a dependent spouse and thus was not entitled to alimony. We agree.

In all non-jury trials, the trial court must specifically find "those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached." *Crocker v. Crocker*, 190 N.C. App. 165, 168, 660 S.E.2d 212, 214 (2008) (quoting *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982); citing N.C. Gen. Stat. § 1A-1, Rule 52 (2007)). A trial court's determination of whether a party is entitled to alimony is reviewable *de novo* on appeal. *Barrett v. Barrett*, 140 N.C. App. 369, 371, 536 S.E.2d 642, 644 (2000) (citing *Rickert v. Rickert*, 282 N.C. 373, 379, 193 S.E.2d 79, 82 (1972)).

Whether a party is entitled to alimony is determined by statute. N.C. Gen. Stat. § 50-16.3A(a) (2013). A party is entitled to alimony, *inter alia*, if (1) that party is a "dependent spouse;" (2) the other party is a "supporting spouse;" and (3) an award of alimony would be equitable under all relevant factors. *Id.* A "dependent spouse" must be either actually substantially dependent upon the other spouse or substantially in need of maintenance and support from the other spouse. *Id.* at § 50-16.1A(2). A party is "actually substantially dependent" upon her spouse if she is currently unable to meet her own maintenance and support. *Barrett*, 140 N.C. App. at 370, 536 S.E.2d at 644 (citing *Williams v. Williams*, 299 N.C. 174, 180, 261 S.E.2d 849, 854 (1980)). A party is "substantially in need of maintenance and support" if she will be unable to meet her needs in the future, even if she is currently meeting those needs. *Barrett*, 140 N.C. App. at 371, 536 S.E.2d at 644. If the trial court determines that a party's reasonable monthly expenses exceed her monthly income, and that she has no other means with which to meet those expenses, it may properly conclude the party is dependent. *Beaman v. Beaman*, 77 N.C. App. 717, 723, 336 S.E.2d 129, 132 (1985).

To determine whether a party is substantially in need of maintenance and support, and therefore a dependent spouse, "the court must determine whether [that] spouse would be unable to maintain his or her accustomed standard of living, established prior to separation, without financial contribution from the other." *Vadala v. Vadala*, 145 N.C. App. 478, 481, 550 S.E.2d 536, 538 (2001). Thus, "[i]t necessarily follows that the trial court must look at the parties' income and expenses in light of their accustomed standard of living" when determining whether a party is properly classified as a dependent spouse. *Helms v. Helms*, 191 N.C. App. 19, 24, 661 S.E.2d 906, 910 (2008) (citing *Williams*, 299 N.C. at 182, 261 S.E.2d at 856)). The reasonableness of a spouse's expenses, including maintenance and support, must be viewed according to the parties' accustomed standard of living during the marriage. *Williams*, 299 N.C. at 183, 261 S.E.2d at 856.

In the instant case, plaintiff testified that she worked three days per week, averaging nine hours per day, and that she earned between $40,000 and $50,000 per year. This assertion was supported by her financial affidavit for her 2012 income of $3,359.68 per month, her 2012 W-2, and several bank statements. Further, plaintiff carefully described her typical weekly work schedule and wages, specifically stating that she earns $250 for the first four hours and $65 per hour afterwards on any given day when she works on an "on-call" basis. Plaintiff explained that she always works whenever her employer calls her, but that the number of hours she works on any particular shift varies greatly, ranging from 10 hours over a two-day period to 16 hours on a single day. Nevertheless, the trial court calculated plaintiff's average net income to be $130,260 per year, even though there was no evidence in the record to suggest that plaintiff was depressing her income by working two or three days per week on an "on call" basis. If the trial court imputed income to plaintiff on the basis of earning capacity, its calculation of plaintiff's income would constitute error. "[B]as[ing] an alimony obligation on earning capacity rather than actual income [requires] the trial court [to] first find that the party has depressed her income in bad faith." *Works v. Works*, 217 N.C. App. 345, 347, 719 S.E.2d 218, 219 (2011) (internal citation omitted). Alternatively, if the trial court included the $7,500 of monthly post-separation support ("PSS") plaintiff received from defendant in calculating her income, this would also constitute error, as PSS—which eventually terminates upon the occurrence of specified events—is not permanent income. *See* N.C. Gen. Stat. § 50-16.1A(4). Therefore, the trial court erred in its calculation of plaintiff's income.

For plaintiff's monthly expenses, the trial court found that plaintiff reported total monthly expenses of $11,468.19, while defendant reported total monthly expenses for himself and the parties' minor child of $8,680.42. Although the trial court found that the parties did not have a household budget, the court characterized plaintiff's expenses as "excessive," and specified that plaintiff "was a spendthrift during the marriage[,]" spent her salary "lavishly" on yearly trips and vacations, and did not use her salary to enhance the marital economy. Because the trial court failed to determine which, if any, of plaintiff's expenditures were reasonable in light of her accustomed standard of living, during the parties' marriage, and failed to engage in the necessary comparison of those reasonable expenses to a correct calculation of plaintiff's income, the court erred in concluding that plaintiff was not a dependent spouse. *See*, *e.g.*, *Williams*, 299 N.C. at 182-83, 261 S.E.2d at 856. As a result, we cannot determine whether plaintiff was a dependent spouse entitled to alimony.

[2] Plaintiff also argues that the trial court's findings are sufficient to support a conclusion that defendant is a supporting spouse. But just because one party is a dependent spouse does not automatically mean that the other party is a supporting spouse. *Barrett*, 140 N.C. App. at 373, 536 S.E.2d at 645. Rather, to be deemed a "supporting spouse," as defined in N.C. Gen. Stat. § 50-16.3A, the party must be either substantially depended upon or substantially relied upon for maintenance and support by the dependent spouse. N.C. Gen. Stat. § 50-16.1A(5).

The trial court may properly conclude a party is a supporting spouse if it determines that he enjoys a surplus of income over expenses. *Barrett*, 140 N.C. App. at 373, 536 S.E.2d at 645. Presuming, without deciding, the record supports plaintiff's contention, the trial court must determine whether defendant was a supporting spouse, if it concludes on remand that plaintiff is a dependent spouse. Accordingly, we vacate that portion of the trial court's order denying plaintiff's alimony claim and remand for findings to determine whether plaintiff is a dependent spouse and whether defendant is a supporting spouse.

In addition, as a practical matter on remand, the trial court should first determine the equitable distribution matters discussed below prior to considering the alimony issues, since the distribution could potentially change the financial circumstances of the parties including the need for or ability to pay alimony. Although N.C. Gen. Stat. § 50-16.3A provides that "[t]he claim for alimony *may* be heard on the merits prior to the entry of a judgment for equitable distribution," it also provides that if alimony is awarded prior to equitable distribution, "the issues of amount and of whether a spouse is a dependent or supporting spouse may be reviewed by the court after the conclusion of the equitable distribution claim." N.C. Gen. Stat. § 50-16.3A (2015) (emphasis added). In addition, N.C. Gen. Stat. § 50-20(f) provides:

> [t]he court shall provide for an equitable distribution without regard to alimony for either party or support of the children of both parties. After the determination of an equitable distribution, the court, upon request of either party, shall consider whether an order for alimony or child support should be modified or vacated pursuant to G.S. 50-16.9 or 50-13.7.

N.C. Gen. Stat. § 50-20(f) (2015).

Since the trial court heard both the alimony claim and the equitable distribution claims simultaneously, it should determine the final equitable distribution prior to determining alimony.

III. Attorneys' Fees

[3] Plaintiff next argues the trial court erred in its denial of her request for attorneys' fees. We agree.

N.C. Gen. Stat. § 50-16.4 provides, "[a]t any time that a dependent spouse would be entitled to alimony pursuant to G.S. 50-16.3A, or post-separation support pursuant to G.S. 50-16.2A, the court may, upon application of such spouse, enter an order for reasonable counsel fees, to be paid and secured by the supporting spouse in the same manner as alimony." N.C. Gen. Stat. § 50-16.4 (2013). Because we vacate that portion of the trial court's order denying alimony and remand for additional findings as to whether plaintiff was entitled to alimony, we also vacate that portion of the order denying plaintiff's claim for attorneys' fees. We remand with instructions for the court to revisit the issue of attorneys' fees, after determining whether plaintiff is entitled to alimony.

IV. Equitable Distribution

Finally, plaintiff asserts the trial court erred in its classification and distribution of marital property to the parties. Specifically, plaintiff argues the trial court erred in classifying an investment account containing $1,469,462 (the "Baird Account") as part separate property, rather than entirely marital property. Plaintiff also argues the trial court erred by entering an unequal distribution in favor of defendant. We disagree with plaintiff's contention regarding the Baird Account, but agree that the trial court must make additional findings of fact prior to granting an unequal distribution. Preliminarily, however, we address defendant's jurisdictional challenge to the equitable distribution order.

A. Wells Fargo UTMA Account

[4] Defendant contends the trial court incorrectly classified and distributed the Wells Fargo Uniform Transfers to Minors Act Account (the "Wells Fargo UTMA Account") he managed for Matthew Carpenter, the parties' minor child, as marital property. Specifically, defendant contends the trial court erred by classifying the Wells Fargo UTMA Account as marital property and distributing its value of $188,648.52 to defendant, which in turn resulted in an alleged error in plaintiff's favor. Defendant, however, concedes that this issue was not preserved for appellate review due to his failure to give timely notice of appeal and file a cross-appeal. Recognizing these errors, prior to filing his brief with this Court, defendant filed a petition for writ of certiorari, which sought appellate review of this and another issue he failed to preserve. Another panel of this Court denied defendant's writ of certiorari. Thus, we are

unable to address the merits of those issues. *North Carolina Nat'l Bank v. Virginia Carolina Builders*, 307 N.C. 563, 567, 299 S.E.2d 629, 631-32 (1983) ("[O]nce a panel of the Court of Appeals has decided a question in a given case that decision becomes the law of the case and governs other panels which may thereafter consider the case.").

Nonetheless, defendant in his brief raises for the first time a challenge to the trial court's jurisdiction to order the distribution of the Wells Fargo UTMA Account. According to plaintiff, because this Court denied defendant's writ of certiorari that sought review of the trial court's allegedly improper classification and distribution of the Wells Fargo UTMA Account to defendant, we are now without authority to address defendant's jurisdictional challenge. We disagree.

Because defendant's petition for writ of certiorari was denied, we must decline to address the merits of those issues presented to and decided by the prior panel. However, the following analysis ought to have applied to defendant's petition for writ certiorari:

> [W]hen a third party holds legal title to property which is claimed to be marital property, that third party is a necessary party to the equitable distribution proceeding, with their participation limited to the issue of the ownership of that property. Otherwise the trial court would not have jurisdiction to enter an order affecting the title to that property.

Upchurch v. Upchurch, 122 N.C. App. 172, 176, 468 S.E.2d 61, 63-64 (1996) (citations omitted). Significantly, defendant argued only that the writ should issue because the trial court erred in classifying the Wells Fargo UTMA Account as martial property and in distributing it to defendant—not because the trial court lacked jurisdiction. As defendant never raised the specific issue of whether the trial court lacked jurisdiction to distribute the Wells Fargo UTMA Account as marital property because the parties' minor child was not joined as a necessary party, another panel of this Court never addressed this issue by denying his petition for writ of certiorari.

It is well settled that "the issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*." *State v. Gorman*, 221 N.C. App. 330, 333, 727 S.E.2d 731, 733 (2012) (citation, quotations, and brackets omitted). Defendant has properly raised this jurisdictional issue for the first time in his brief, and we must address it. *See, e.g.*, *Obo v. Steven B.*, 201 N.C. App. 532, 537, 687 S.E.2d 496, 500 (2009) ("[T]his Court has not only the power, but the

duty to address the trial court's subject[-]matter jurisdiction on its own motion or *ex mero motu*.").

> Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal. Subject-matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. Subject-matter jurisdiction derives from the law that organizes a court and cannot be conferred on a court by action of the parties or assumed by a court except as provided by that law. When a court decides a matter without the court's having jurisdiction, then the whole proceeding is null and void, i.e., as if it had never happened. Thus the trial court's subject-matter jurisdiction may be challenged at any stage of the proceedings.

Rodriguez v. Rodriguez, 211 N.C. App. 267, 270, 710 S.E.2d 235, 238 (2011) (citing *McKoy v. McKoy*, 202 N.C. App. 509 ,512, 689 S.E.2d 590, 592 (2010) (citations and quotation marks omitted)).

Recently in *Nicks v. Nicks*, this Court held that the trial court lacked jurisdiction to order the distribution of Entrust, LLC, which was claimed to be marital property, where a trust which established 100% membership interest in Entrust was not joined as a necessary party. ___ N.C. App. ___, ___, 774 S.E.2d 365, 373 (2015). In reaching its decision, the *Nicks* Court cited *Upchurch* and other cases where this Court concluded that the trial court lacked jurisdiction to order equitable distribution of property claimed to be marital property where a third party that held legal title to the property was never joined as a party:

> This Court's prior holdings make clear that "when a third party holds legal title to property which is claimed to be marital property, that third party is a necessary party to the equitable distribution proceeding, with their participation limited to the issue of the ownership of that property." *Upchurch v. Upchurch*, 122 N.C. App. 172, 176-77, 468 S.E.2d 61, 63-64 (holding the trial court lacked jurisdiction to order equitable distribution of a note "executed for the benefit of Husband 'or' Jack A. Upchurch" because Jack A. Upchurch was never joined as a party to the action), *disc. review denied*, 343 N.C. 517, 472 S.E.2d 26 (1996); *see also Daetwyler v. Daetwyler*, 130 N.C. App. 246, 252, 502 S.E.2d 662, 666 (1998) (holding that the trial court lacked jurisdiction to order equitable distribution of certificates of

> deposit jointly titled in the names of the husband and his mother and sister, who were not named as parties to the action), *affirmed per curiam*, 350 N.C. 375, 514 S.E.2d 89 (1999); *Dechkovskaia*, __ N.C. App. at __, 754 S.E.2d at 835 (holding that the trial court lacked jurisdiction to order equitable distribution of two houses titled in the name of the parties' minor child because the minor child was never made a party to the action). Here, the Trust—which holds legal title to Entrust—was never named as a party to this action. We therefore hold that the trial court lacked jurisdiction to order equitable distribution of Entrust. *See, e.g.*, *Upchurch*, 122 N.C. App. at 176, 468 S.E.2d at 64 ("Otherwise the trial court would not have jurisdiction to enter an order affecting the title to that property.") (citation omitted).

Id. at __, 774 S.E.2d at 372-73.

In the instant case, the Wells Fargo UTMA Account, designated as "FREDERICK J CARPENTER JR C/F MATTHEW CARPENTER UTMA NC," was classified as marital property and distributed to defendant. "Chapter 33A of our General Statutes, entitled 'North Carolina Uniform Transfers to Minors Act,' governs the creation and maintenance of UTMA accounts in this State." *Belk ex rel. Belk v. Belk*, 221 N.C. App. 1, 9, 728 S.E.2d 356, 361 (2012). N.C. Gen. Stat. § 33A-9 (2015) provides in pertinent part:

> Custodial property is created and a transfer is made whenever: . . . Money is paid . . . to a . . . financial institution for credit to an account in the name of the transferor . . . followed in substance by the words: "as custodian for _____ (name of minor) under the North Carolina Uniform Transfers to Minors Act."

"A transfer made pursuant to [section] 33A-9 is irrevocable, and the custodial property is indefeasibly vested in the minor[.]" N.C. Gen. Stat. § 33A-11(b) (2015). Whether this account should be classified and distributed as marital property is an issue that can only be determined if Matthew Carpenter—who owns the legal title to this property—is made a party to the action. *See Dechkovskaia v. Dechkovskaia*, __ N.C. App. __, __, 754 S.E.2d 831, 835 (2014) (trial court lacked authority to classify two houses—both of which were titled only in the name of the parties' minor child—"as martial [sic] property, to include them in the valuation of the marital estate, and to distribute them to defendant"). Without

joining Matthew as a party to this action prior to adjudicating the ownership of the Wells Fargo UTMA Account, which was determined to be marital property, the trial court lacked jurisdiction to order its distribution. Therefore, we vacate the portion of the trial court's equitable distribution order that classified and distributed the Wells Fargo UTMA Account and remand for the trial court to join Matthew Carpenter as a party to the action prior to its reconsideration of the classification and, if appropriate, distribution of this account.

B. R.W. Baird Account

[5] We next address plaintiff's argument that the trial court erred in classifying a portion of the Baird Account as separate property. The standard of review on the trial court's classification in an equitable distribution of property is well settled: "[w]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Romulus v. Romulus*, 215 N.C. App. 495, 498, 715 S.E.2d 308, 311 (2011) (quoting *Lee v. Lee*, 167 N.C. App. 250, 253, 605 S.E.2d 222, 224 (2004)). "While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings, conclusions of law are reviewable *de novo*." *Romulus*, 215 N.C. App. at 498, 715 S.E.2d at 311 (internal citation omitted) (emphasis added).

When making an equitable distribution of a marital estate, a trial court must first classify all property owned by the parties as marital, separate, or divisible. N.C. Gen. Stat. § 50-20(a). "Marital property" encompasses all real and personal property, presently owned, which was acquired by either or both spouses during marriage but before separation. *Id.* § 50-20(b)(1). In comparison, "separate property" is any real or personal property acquired individually by a spouse before marriage, or by devise, descent, or gift. *Id.* § 50-20(b)(2). Finally, "divisible property" is any real or personal property acquired by either spouse after the date of separation, but before the date of distribution. *Id.* § 50-20(b)(4). There is a rebuttable presumption that property acquired after the date of marriage and before separation is marital property. *Id.* § 50-20(b)(1).

North Carolina recognizes the "source of funds" rule, under which assets purchased with, or comprised of, part marital and part separate funds are considered "mixed property" for equitable distribution purposes. *King v. King*, 112 N.C. App. 92, 97, 434 S.E.2d 669, 672 (1993) (citing *Wade v. Wade*, 72 N.C. App. 372, 382, 325 S.E.2d 260, 269 (1985)). In instances where a trial court is charged with distributing mixed property, "each [party] is entitled to an interest in the property in the

ratio [his] contribution bears to the total investment in the property." *Wade*, 72 N.C. App. at 382, 325 S.E.2d at 269. Where separate property is invested along with marital property in an asset during marriage but before separation, such commingling "does not necessarily transmute [the] separate property into marital property." *Power v. Power*, ___ N.C. App. ___, ___, 763 S.E.2d 565, 569 (2014) (quoting *Fountain v. Fountain*, 148 N.C. App. 329, 333, 559 S.E.2d 25, 29 (2002)). Commingled separate property would, however, be transmuted into marital property, if the party making the separate contribution "is unable to trace the initial deposit into its form at the date of separation." *Power*, ___ N.C. App. at ___, 763 S.E.2d at 569 (internal citation and quotation omitted). "[T]he party claiming a certain classification has the burden of showing, by a preponderance of the evidence, that the property is within the claimed classification." *Brackney v. Brackney*, 199 N.C. App. 375, 383, 682 S.E.2d 401, 406 (2009) (citation omitted).

In the instant case, the trial court found on the date of separation, the value of the Baird Account was $1,469,462. Defendant traced his separate contributions from 11 November 1995, the date of the parties' marriage, when the Baird Account had a value of $225,894. This account was subsequently funded with additional principal contributions of defendant's separate property from 1996 through 2007, for a total separate contribution, by defendant, in the amount of $546,917. The trial court classified $546,917 as defendant's separate property.

The trial court also found that defendant routinely contributed marital funds to the Baird Account that were co-mingled with defendant's separate funds. Overall, the Baird Account appreciated in value between the date of marriage and the date of separation, over and above all principal contributions. However, since defendant testified that he could not itemize whether gains and losses in the Baird Account were attributable to the performance of his separate property, the trial court also classified the balance of the Baird Account, $922,545, as marital property.

The trial court's findings of fact regarding the Baird Account were supported by competent evidence, and the trial court's findings support its conclusion of law that part of the Baird Account was part separate property, and part marital property. Accordingly, we affirm that portion of the trial court's order distributing the Baird Account as defendant's separate property in the amount of $546,917 and $922,545 as marital property.

C. Unequal Distribution

[6] We now address plaintiff's assertion that the trial court erred in granting an unequal distribution in favor of defendant because of its

failure to specifically find that an equal division of property between plaintiff and defendant would not be equitable. "We review the trial court's distribution of property for an abuse of discretion." *Romulus*, 215 N.C. App. at 498, 715 S.E.2d at 311 (citation omitted).

N.C. Gen. Stat. § 50-20(c) provides, "[t]here shall be an equal division [of property] by using net value of marital property and net value of divisible property *unless the court determines that an equal division is not equitable*." N.C. Gen. Stat. § 50-20(c) (emphasis added). The statute further provides, "[i]f the court determines that *an equal division is not equitable*, [it] shall divide the . . . property equitably." *Id.* (emphasis added).

The trial court in the instant case specifically found that "[t]he defendant has rebutted the presumption favoring an equal . . . distribution of marital property." However, this finding does not comply with the mandate of N.C. Gen. Stat. § 50-20(c). As our Supreme Court noted in *White v. White*,

> [N.C. Gen. Stat. § 50-20(c)] does not create a "presumption" in any of the senses that term has been used to express "the common idea of assuming or inferring the existence of one fact from another fact or combination of facts." 2 Brandis on North Carolina Evidence, § 215 (2d ed. 1982). Instead, the statute is a legislative enactment of public policy so strongly favoring the equal division of marital property that an equal division is made *mandatory* "unless the court determines that an equal division is not equitable." N.C.G.S. 50-20(c). The clear intent of the legislature was that a party desiring an unequal division of marital property bear the burden of producing evidence concerning one or more of the twelve factors in the statute and the burden of proving by a preponderance of the evidence that an equal division would not be equitable. Therefore, if no evidence is admitted tending to show that an equal division would be inequitable, the trial court *must* divide the marital property equally.

312 N.C. 770, 776-77, 324 S.E.2d 829, 832-33 (1985). And in *Lucas v. Lucas*, this Court reversed and remanded an equitable distribution order because there was no assurance "that the trial court gave proper consideration to the policy favoring an equal division of the estate." 209 N.C. App. 492, 504, 706 S.E.2d 270, 278 (2011). The *Lucas* Court's reasoning was as follows:

> [I]n order to divide a marital estate other than equally, the trial court must first find that an equal division is not equitable and *explain why*. Then, the trial court must decide what is equitable based on the factors set out in N.C. Gen. Stat. § 50-20(c)(1)-(12) after *balancing* the evidence in light of the policy favoring equal division. . . .
>
> On remand, the trial court must make the determinations required by N.C. Gen. Stat. § 50-20(c) and *White*.

Id. (emphasis added). While there is no case law requiring a trial court to use "magic words" indicating that an equal distribution is not equitable, it is clear that the trial court's finding that the "presumption" favoring an equal distribution had been "rebutted" by defendant was not sufficient, given the holding in *Lucas*, to allow the court to grant an unequal distribution. Specifically, after the trial court determines plaintiff's correct income, the trial court will also have to determine the relative financial circumstances of both parties with respect to income, assets, and liabilities. The trial court made an effort to do so here, as evidenced by the following findings:

> W. This Court finds that an unequal division of marital property is equitable for the following reasons:
>
> 1. Defendant suffers from a serious disability.
> 2. Based on Defendant's prognosis, it is likely that he will be required to work less hours and earn less money in the future.
> 3. Plaintiff has the present ability to work full time.
> 4. Plaintiff has the present ability to earn a salary that is comparable to or greater than the yearly salary she earned during the course of the marriage.

Although the trial court made other findings of fact relevant to some of the factors listed under N.C. Gen. Stat. § 50-20(c), including a listing of findings the court designated as "other factors" under N.C. Gen. Stat. § 50-20(c)(12), the order specifically relied upon only the four factors noted above as supporting an unequal distribution. These factors would fall under N.C. Gen. Stat. §§ 50-20(c)(1) and (3), which are "the income, property, and liabilities of each party at the time the division of property is to become effective" and the "physical and mental health of both parties." N.C. Gen. Stat. § 50-20(c)(1), (3) (2015). Despite the prior findings

of fact addressing various other distributional factors under N.C. Gen. Stat. § 50-20(c), the order states: "This Court finds that an unequal division of marital property is equitable for the following reasons" and lists only the four reasons above. It is not clear how much, if any, weight the court gave the other findings which would appropriately be considered under N.C. Gen. Stat. § 50-20(c).

We recognize that although there are many potential distributional factors the trial court may consider, "the finding of a single distributional factor under N.C. Gen. Stat. § 50-20(c) may support an unequal division." *Jones v. Jones*, 121 N.C. App. 523, 525, 466 S.E.2d 342, 344 (1996) (citation omitted); *Edwards v. Edwards*, 152 N.C. App. 185, 187, 566 S.E.2d 847, 849 (2002). But we are unable to discern how much weight the trial court gave to the factor of the plaintiff's income and earning capacity. As discussed above in regard to the alimony issue, the trial court must on remand consider plaintiff's earnings and whether she was acting in bad faith to suppress her income. To the extent that the unequal distribution was based upon any error as to plaintiff's actual earnings or earning capacity, the trial court must reconsider the distributional factors and its determination as to whether an equal division is not equitable. In addition, the trial court may weigh the factors differently depending upon its determination regarding the Wells Fargo UTMA Account. The trial court must make appropriate findings on remand.

V. Conclusion

The portion of the equitable distribution order pertaining to the Baird Account was properly distributed as part separate and part marital property and is affirmed. The portion of the order pertaining to the Wells Fargo UTMA Account is vacated for lack of jurisdiction. On remand, Matthew Carpenter must be joined as a necessary party prior to the trial court's reconsideration of the classification and, if appropriate, distribution of the UTMA Account.

We remand the issue of equitable distribution to the trial court to determine, in accordance with *Lucas* and N.C. Gen. Stat. § 50-20(c)(1)-(12), whether an equal distribution is equitable and, if it determines that it is not, what type of distribution is equitable. Our remand "does not mean that the trial court's ultimate decision was in error." *Lucas*, 209 N.C. App. at 504, 706 S.E.2d at 278. However, the new order needs to include consideration of the policies and factors established by the General Assembly and as set forth herein. *Id.*

The portion of the trial court's order denying alimony and attorneys' fees was based on inadequate findings and conclusions and, therefore,

is vacated. On remand, after first determining the equitable distribution claim, the trial court must make adequate findings to support its alimony determination, taking into consideration the financial circumstances of the parties as established by the equitable distribution on remand, and, if it concludes that plaintiff is entitled to alimony, the trial court must also address whether plaintiff is entitled to attorneys' fees.

AFFIRMED IN PART; VACATED IN PART; AND REMANDED.

Judges STROUD and TYSON concur.

TREVA EASON, PLAINTIFF
v.
JASON TAYLOR, DEFENDANT

No. COA15-779

Filed 19 January 2016

1. Divorce—equitable distribution—findings and conclusions—distribution of property and debt

The trial court in an equitable distribution action did not follow the mandates of N.C.G.S. § 50-20 by failing to make the required findings of fact, conclusions of law, and distribution of marital property and debt. Where the parties have presented evidence of the marital and divisible property and debts and separate property, as they did here, and where the trial court even acknowledged that the equitable distribution claim was properly before the court and that marital and separate property and debt existed, there was simply no legal rationale for a conclusion that equitable distribution was "not warranted."

2. Divorce—equitable distribution—mostly debt—worthy of distribution

The trial court erred in an equitable distribution action by seeming to consider the fact that the parties had mostly debt as rendering the claim unworthy of distribution. The trial court must address the classification, valuation, and distribution of the property and debt, regardless of value. The trial court simply took the parties at their word that each would pay certain debts, without actually classifying, valuing, and distributing the debts by order, so that each party may have some possibility of legal recourse if the other should fail to pay.

3. Divorce—equitable distribution—failure of plaintiff to settle

The trial court erred in an equitable distribution action where it appeared to base the determination that equitable distribution was not warranted, as well at its award of attorney fees, on pro se plaintiff's failure to negotiate a settlement. As a matter of law, it does not matter what, if anything, defendant offered plaintiff to settle the equitable distribution claim. Furthermore, in this case, the trial court in a bench trial did not disregard the incompetent evidence that the case was not settled but explicitly based its determination that equitable distribution was "not warranted" at least in part upon the finding that "this matter could have been settled."

4. Divorce—equitable distribution—attorney fees—not supported by record

The trial court erred by awarding attorney fees to defendant in an equitable distribution claim. As a general rule, attorney fees are not recoverable in an equitable distribution claim. Neither the record in this case nor the trial court's findings revealed any indication of either of the two statutory instances in which attorney fees may be awarded in an equitable distribution claim.

Appeal by plaintiff from order entered on or about 9 February 2015 by Judge Karen Eady-Williams in District Court, Mecklenburg County. Heard in the Court of Appeals 3 December 2015.

Church Watson Law, PLLC, by Kary C. Watson, for plaintiff-appellant.

No brief filed for defendant-appellee.

STROUD, Judge.

Plaintiff appeals from an unusual order denying her claim for equitable distribution and awarding defendant attorney fees for having to defend the equitable distribution claim because "[t]his matter could have settled." For the following reasons, we affirm in part, vacate in part, and remand.

I. Background

Plaintiff-wife and defendant-husband were married on 3 August 2002 and separated on or about 12 February 2012. On or about 15 February 2012, plaintiff filed a complaint against defendant seeking

post-separation support and alimony, equitable distribution, attorney fees, and an interim distribution of the marital home in Charlotte and the associated mortgage payment. Plaintiff was represented by counsel when she filed the complaint. On or about 16 March 2012, defendant filed an answer responding to the allegations of the complaint, raising various defenses and "Factual Allegations[.]" In the "Factual Allegations[,]" defendant acknowledged that the parties had marital property and debt "which are both subject to equitable distribution in this matter[.]" Defendant requested equitable distribution and attorney fees. On 4 April 2012, plaintiff filed her reply to defendant's answer and defenses as well as a financial affidavit.

On 16 April 2012, the trial court entered a memorandum of judgment/order of interim equitable distribution which addressed possession of the home located in Charlotte, payment of the mortgage, listing the home for sale, allocation of various debts, and final resolution of "the issue of post-separation support only." On 18 January 2013, an initial equitable distribution pretrial conference, scheduling and discovery order was entered with the consent of both parties. On 31 January 2013, plaintiff filed her equitable distribution affidavit; her affidavit alleged a net fair market value of the parties' marital and divisible property as $8,000.00, total marital debt of $18,414.01, and total non-marital debt of $71,294.21.

Plaintiff itemized a substantial amount of marital debt including the mortgage for the home in Charlotte, as well as marital property including two motor vehicles and a bank account. On 1 February 2013, defendant filed his equitable distribution affidavit, which alleged the total fair market value of marital property as $9,642.68, divisible property with a negative value of $27,240.83, total marital debt of $5,730.83, and total non-marital debt of $3,407.33.

On 4 March 2014, the trial court held a hearing on the equitable distribution claim.[1] The order includes findings of fact regarding the parties' residence, marriage, and pending claims. But instead of proceeding to make findings of fact as required by North Carolina General Statute § 50-20 regarding the classification, and distribution of the marital, divisible, and separate property and debts, the order instead includes the following findings of fact:

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1. Plaintiff's claim for alimony was also scheduled for hearing, but she asked that this claim be dismissed "because I don't need the alimony now. Like I said, at the time I was a dependent spouse. I now have a job and I can support myself. So, I don't want alimony from him." The trial court's denial of alimony is not challenged on appeal.

9. As to the marital assets, the one primary asset is the marital home. It has since been foreclosed and has a deficiency judgment in an approximate amount of $53,000.

10. Defendant is willing to keep the deficiency judgment and is not seeking distribution of this debt.

11. As to the other marital debts, the only debts provided to the court were credit card debts. However, each party is in agreement that they will keep their marital debts related to their credit cards. Plaintiff testified that she will pay her credit card debts and is not seeking any payments on the cards from Defendant.

12. The credit card debts and [(sic)] will not be valued or distributed.

13. Plaintiff agrees that she is no longer and [(sic)] dependent spouse. And there is insufficient evidence for Plaintiff to be deemed a dependent spouse.

14. The Plaintiff is not entitled to alimony. There has been no showing of need by Plaintiff.

15. This action proceeded to trial that could have settled. Defendant had to hire an attorney to proceed to defend the claims that did not warrant a hearing. This matter could have settled.

16. Legal fees have been unnecessarily incurred by Defendant due to multiple filings and research.

17. Defendant has incurred legal fees in the amount of $7,500.

The trial court then made these conclusions of law:

1. This Court has jurisdiction over the parties and the subject matter herein.

2. That the personal property described in the above paragraphs is the marital and separate property of the parties as defined in North Carolina General Statutes 50-20(b)(1). However, classification, valuation and distribution is not warranted.

3. Plaintiff is not a dependent spouse.

On or about 9 February 2015, based only upon these findings of fact and conclusions of law, in an order signed nearly a year later, the trial court denied "[a]ll claims for equitable distribution[,]" denied plaintiff's alimony claim, ordered that plaintiff pay defendant $3,000.00 in attorney fees, and decreed that "[a]ny terms of this order shall supersede the Interim Distribution Order." On 5 March 2015, plaintiff timely filed notice of appeal.

II. Equitable Distribution

[1] Plaintiff raises three arguments regarding her equitable distribution claim. Because these arguments all focus on the same or similar legal analysis, we address them together. Plaintiff argues that the trial court erred as a matter of law by failing to follow the statutory mandates of North Carolina General Statute § 50-20, which require the trial court to classify, value, and distribute the parties' marital and divisible property and debt: "Upon application of a party, the court shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the parties in accordance with the provisions of this section." N.C. Gen. Stat. § 50-20(a) (2013). Although plaintiff raises two other related issues, we need not address those as we agree with plaintiff on this issue, and thus we must vacate the judgment as to equitable distribution.

Plaintiff argues that the trial court did not follow the mandates of North Carolina General Statute § 50-20 by failing to make the required findings of fact, conclusions of law, and distribution of marital property and debt.

> On appeal, when reviewing an equitable distribution order, this Court will uphold the trial court's written findings of fact as long as they are supported by competent evidence. However, the trial court's conclusions of law are reviewed *de novo*. Finally, this Court reviews the trial court's actual distribution decision for abuse of discretion.

Mugno v. Mugno, 205 N.C. App. 273, 276, 695 S.E.2d 495, 498 (2010) (citations and quotation marks omitted).

In this case, both parties presented sufficient evidence to allow the trial court to classify, value, and distribute several items of marital or separate property and debts. The trial court acknowledged generally "[t]hat the personal property described in the above paragraphs is the marital and separate property of the parties as defined in North Carolina

General Statutes 50-20(b)(1)." The trial court then further concluded that "classification, valuation and distribution is not warranted." This conclusion of law is not supported by the findings of fact or by the law. *See generally* N.C. Gen. Stat. § 50-20. Where the parties have presented evidence of the marital and divisible property and debts and separate property, as they did here, and the trial court has even acknowledged that the equitable distribution claim is properly before the court and that marital and separate property and debt exists, there is simply no legal rationale for a conclusion that equitable distribution "is not warranted." Defendant did not file a brief on appeal, but we feel quite confident in stating that defendant would have been unable to cite any law to support this conclusion, since none exists. Even though some of the marital property, such as the marital home, was no longer in the possession of the parties, the trial court still has a duty to equitably divide the marital property and debts existing as of the date of separation. *See* N.C. Gen. Stat. § 50-21(b) (2013) ("For purposes of equitable distribution, marital property shall be valued as of the date of the separation of the parties, and evidence of preseparation and postseparation occurrences or values is competent as corroborative evidence of the value of marital property as of the date of the separation of the parties. Divisible property and divisible debt shall be valued as of the date of distribution.)"

[2] The trial court seemed to consider the fact that the parties had mostly debt as rendering the plaintiff's claim as unworthy of consideration. But the trial court must address the classification, valuation, and distribution of the property and debt, regardless of the value. *See generally* N.C. Gen. Stat. § 50-20. The trial court does not lose its ability to distribute marital assets simply because marital debts equal or exceed the value of those assets. *See id.* In addition, where marital debts significantly reduce the net marital estate, such as here where there is a deficiency judgment of approximately $53,000.00 due to the foreclosure of the marital home, the trial court still retains the discretion to independently distribute the individual assets and debts. *See Conway v. Conway*, 131 N.C. App. 609, 614, 508 S.E.2d 812, 816 (1998) ("The trial court does not lose its ability to distribute marital assets simply because marital debts equal or exceed the value of those assets. In addition, where marital debts significantly reduce the net marital estate, the trial court still retains the discretion to distribute the individual assets and debts independently. Otherwise, the trial court would lose its authority to distribute significant assets merely because there are unrelated debts diminishing the net value of the estate." (citations omitted)), *disc. review dismissed and denied*, 350 N.C. 593, 537 S.E.2d 210 (1999).

Even if all the parties have to distribute is debt, an equitable distribution order allocating that debt may still be of value to the parties. *See Rawls v. Rawls*, 94 N.C. App. 670, 676, 381 S.E.2d 179, 182 (1989) ("The court found that the parties had acquired no marital property, and therefore concluded that there was no estate to be adjusted pursuant to N.C. Gen. Stat. § 50-20(c) . . . . In reaching this conclusion the trial court neglected, however, to consider the debts incurred by the parties during their marriage. Debt, as well as assets, must be classified as marital or separate property. In effectuating an equitable distribution the trial court must consider the parties' debts. If it finds that a particular debt is marital, that is, a debt incurred during the marriage for the joint benefit of the parties, it possesses discretion to equitably apportion or distribute the debt between the parties." (citations, quotation marks, and brackets omitted)). In this order, the trial court simply took the parties at their word that each would pay certain debts, without actually classifying, valuing, and distributing the debts by order, so that each party may have some possibility of legal recourse if the other should fail to pay.

[3] Furthermore, upon review of the entire transcript of the hearing, in addition to the negative value of the martial estate, it appears that the trial court may have based its determination that equitable distribution was "not warranted[,]" as well as its award of attorney fees, on plaintiff's failure to negotiate a settlement with defendant's counsel. In fact, the trial court found, "This action proceeded to trial that could have been settled" and that "Defendant had to hire an attorney to proceed to defend the claims that did not warrant a hearing." At the hearing, defendant's counsel informed the court of her efforts to negotiate with plaintiff, who was unrepresented, and the trial court asked plaintiff why she would not negotiate. Although plaintiff should not be required to explain her refusal to negotiate with defendant's counsel, as this has no bearing on equitable distribution, plaintiff nonetheless explained, "Well, I feel like for me -- In order for me to go through any kind of settlement with his attorney or him, I would need to be represented to do that, because I do not trust trying to talk to them and settle anything[,]" and upon further inquiry by the trial court, she then clarified:

> I understand what you're saying, but I also understand from where this all started. And I would like to have had this resolved a long time ago. The thing is that, like I said, when you're negotiating with somebody, you have to come with good faith. That has not been the case. And I feel like the only alternative I have had was to show up to court.

> I do not have the resources to hire an attorney to represent me. So, the only thing that I could do was show up to court and try to resolve it.

As a matter of law, it does not matter what, if anything, defendant offered plaintiff to settle the equitable distribution claim.[2] *See generally* N.C. Gen. Stat. § 1A-1, Rule 68 (2013) (regarding offers of judgment and their general inadmissibility); N.C. Gen. Stat. § 8C-1, Rule 408 (2013) (regarding inadmissibility of compromise negotiations). Even if defendant made a generous offer, plaintiff was not obligated to accept it, nor would their negotiations, if they had occurred, been a proper matter for the trial court to consider. *See Karriker v. Sigmon*, 43 N.C. App. 224, 226, 258 S.E.2d 473, 474 (1979) ("By case law, plaintiff may not show efforts made by her to settle or compromise her case during the trial of it. Suffice it to say, this rule applies equally to plaintiff and defendant. Since such evidence may not be properly introduced at trial, it clearly follows that neither counsel for plaintiff nor defendant may argue such to the jury." (citations omitted)), *disc. review denied*, 299 N.C. 121, 262 S.E.2d 6 (1980). Although plaintiff, who was *pro se*, did not object to questions regarding settlement negotiations, "there is a presumption in a bench trial . . . that the judge disregarded any incompetent evidence that may have been admitted unless it affirmatively appears that he was influenced thereby." *In re H.L.A.D.*, 184 N.C. App. 381, 395, 646 S.E.2d 425, 435 (2007) (citation and quotation marks omitted), *aff'd per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008). In this case, the trial court did not disregard the incompetent evidence but explicitly based its determination that equitable distribution was "not warranted[,]" at least in part upon the finding that "[t]his matter could have been settled." Thus, we vacate and remand. On remand, the trial court must classify, value, and distribute the property at issue, as supported by the competent evidence presented. *See* N.C. Gen. Stat. § 50-20.

III. Attorney Fees

[4] Plaintiff also argues that the trial court erred in awarding attorney fees to defendant. As a general rule, attorney fees are not recoverable in an equitable distribution claim. *See Patterson v. Patterson*, 81 N.C. App. 255, 262, 343 S.E.2d 595, 600 (1986) ("Additionally, attorneys' fees are not recoverable in an action for equitable distribution so that, in a combined action, the fees awarded must be attributable to work by the

2. Defendant did not file an offer of judgment pursuant to North Carolina General Statute § 1A-1, Rule 68.

attorneys on the divorce, alimony and child support actions.") In this case, although plaintiff had initially brought a claim for alimony, at the time of trial she had abandoned this claim, and in any event, the attorney fees as awarded in the order were clearly based upon the equitable distribution claim only. North Carolina General Statutes §§ 50-20 and 21 sets out two instances in which a party may recover attorney fees, neither of which is applicable in this case: (1)

> [u]pon application by the owner of separate property which was removed from the marital home or possession of its owner by the other spouse, the court may enter an order for reasonable counsel fees and costs of court incurred to regain its possession, but such fees shall not exceed the fair market value of the separate property at the time it was removed

or (2) as a sanction when a "party has willfully obstructed or unreasonably delayed[.]" N.C. Gen. Stat. §§ 50-20(i); -21(e). Neither the record in this case nor the trial court's findings reveal any indication at all of either of these instances in which attorney fees may be awarded in an equitable distribution claim. Thus, the trial court's order regarding attorney fees is vacated.

IV. Conclusion

In conclusion, because plaintiff abandoned her claim for alimony, we affirm the trial court's denial of this claim. As to attorney fees, we vacate this portion of the order because without the alimony claim there is no potential legal basis for entry of such an award and no basis for further consideration. Lastly, we vacate the trial court's order as to equitable distribution and remand. Upon the request of either party, the trial court shall permit the presentation of additional evidence prior to entry of a new order. If neither party requests to present additional evidence, the trial court may, in its discretion, either enter a new order based upon the current record or may receive additional evidence before entry of a new order.

AFFIRMED in part, VACATED in part, and REMANDED.

Judges DIETZ and TYSON concur.

GREENSHIELDS, INC., PLAINTIFF
v.
TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA AND THE ST. PAUL TRAVELERS COMPANIES, INC., DEFENDANTS

No. COA15-539

Filed 19 January 2016

1. Insurance—findings—supported by evidence—unchallenged findings

In an insurance dispute where there was competent evidence to support challenged findings of fact, and unchallenged findings were presumed correct, the trial court's conclusions of law were proper in light of such findings.

2. Collateral Estoppel and Res Judicata—res judicata—not supported by findings—alternative conclusion sufficient

Where the findings of fact in an insurance dispute did not support the trial court's conclusion of law regarding *res judicata*, the trial court's alternative conclusion of law—that plaintiff engaged in undue and unreasonable delay—supported its judgment.

3. Civil Procedure—motions to amend denied—no abuse of discretion

Although plaintiff claimed that the trial court abused its discretion by denying plaintiff's motions to amend, the trial court listed numerous reasons to support its decision and the challenged action was not "manifestly unsupported by reason." The trial court did not abuse its discretion.

4. Civil Procedure—failure to prosecute—factors to be addressed

The trial court did not err in granting defendants' motion to dismiss with prejudice, based on Rule 41(b), where the argument was that plaintiff failed to prosecute. The trial court addressed the necessary three factors before dismissing for failure to prosecute under Rule 41(b).

5. Jurisdiction—subject matter—dismissal on other basis

Although plaintiff argued that the trial court erroneously dismissed plaintiff's claim based upon an alleged lack of subject matter jurisdiction, the trial court did not grant defendants' motion to dismiss based on lack of subject matter jurisdiction.

6. Statutes of Limitations and Repose—statute of limitations—not the basis of ruling

Although plaintiff argued that the trial court erroneously determined that the statute of limitations barred plaintiff's claim, the trial court's conclusion of law addressed *res judicata* and did not mention "statute of limitations." It was the bankruptcy court that concluded plaintiff's claims were barred by the statute of limitations.

Appeal by plaintiff from Order entered 3 February 2015 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 19 October 2015.

BRENT ADAMS & ASSOCIATES, by Brenton D. Adams, for plaintiff.

ELLIS & WINTERS LLP, by Jonathan A. Berkelhammer and Lenor Marquis Segal, for defendants.

ELMORE, Judge.

Greenshields, Inc. (plaintiff) appeals from the trial court's order entered 3 February 2015 denying its motions to amend and granting Travelers Property Casualty Company of America and The St. Paul Travelers Companies, Inc.'s (defendants) motion to dismiss. After careful consideration, we affirm.

I. Background

On 17 August 2004, a fire occurred in the building housing plaintiff's restaurant. At that time, plaintiff was insured under a policy issued by St. Paul Travelers Companies, Inc., which is alleged to be the predecessor to Travelers Property Casualty Company of America. Plaintiff submitted a claim to defendants under the insurance policy, and between October 2004 and March 2005 defendants paid plaintiff a total of $210,492.13 against the loss claim. Because the parties could not agree on the total amount of the loss, they invoked the appraisal clause of the insurance policy. Per the appraisal clause, each party selected an appraiser, and the appraisers appointed retired Superior Court Judge Robert Farmer to serve as an umpire for the dispute. The appraisal hearings were conducted in July, October, and November 2005. Plaintiff also filed a complaint on 16 August 2005 in Wake County Superior Court seeking to recover damages under the policy and for "a declaratory judgment from

this Court stating that it is entitled to have and recover the full amount of its damages claim[.]"

On 30 November 2005, the umpire entered an award of $854,000 in favor of plaintiff. Defendants believed they were entitled to deduct from the appraisal award the $210,492.13 that they previously paid, and they refused to pay the full $854,000. On 14 March 2007, the parties filed a stipulation in superior court agreeing that the issues involved in the lawsuit filed 16 August 2005 have been referred to appraisal and until the appraisal process is complete, "there is no way to make a determination as to whether there are any issues to be heard in the Superior Court Division of Wake County[.]" Subsequently, on 15 June 2007 the umpire issued a "Statement of Clarification," and on 18 September 2007, he issued a "Corrected Award," clarifying that any previous payments were not to be applied as a credit to reduce the appraisal award. Defendants still refused to pay the full $854,000.

On 11 December 2007, the superior court entered an "Order of Dismissal," ordering "that this case be removed from the trial docket of active cases and placed as a closed file without prejudice to previous orders herein, and without prejudice to the entry of motions and orders in the future." The following day, defendants filed an answer and counterclaim to plaintiff's complaint, alleging eight affirmative defenses.

In January 2009, plaintiff filed a voluntary petition for relief pursuant to Chapter 7 of the Bankruptcy Code. On 13 February 2012, plaintiff filed an adversary proceeding in bankruptcy court, and on 16 April 2012, defendants filed a motion to dismiss pursuant to Rule 12(b)(6), alleging that plaintiff's claims were time-barred by the statute of limitations. The bankruptcy court entered an order on 23 July 2012 granting defendants' motion to dismiss without prejudice "to allow the plaintiff an opportunity to amend his complaint to include the underlying facts regarding the alleged tolling agreement."

On 25 September 2013, plaintiff filed a motion to amend its complaint in Wake County Superior Court, apparently pursuant to the bankruptcy court's order. On 23 December 2014, defendants filed a motion to dismiss with prejudice in superior court pursuant to Rule 12(b)(1) and Rule 41(b). Subsequently, plaintiff filed an amended motion to amend its complaint in superior court on 3 January 2015. The superior court entered an order on 3 February 2015 denying plaintiff's motions to amend its complaint and granting defendants' motion to dismiss with prejudice. Plaintiff appeals.

II. Analysis

A. Findings of Fact

[1] Plaintiff asserts that the trial court made findings of fact that were not supported by the evidence, namely portions of paragraphs fifteen, seventeen, eighteen, nineteen, twenty, and twenty-one. Plaintiff argues that they should be stricken and judgment should be reversed and remanded for a trial on the merits. Defendants contend that the remaining unchallenged findings of fact independently support dismissal, and plaintiff does not present any evidence to the contrary. Instead, plaintiff "broadly and baldly" states that six of the numerous detailed findings of fact are not supported by evidence.

Where the superior court sits without a jury, the standard of review on appeal is "whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Findings of fact by the trial court . . . are conclusive on appeal if there is evidence to support those findings." *Medina v. Div. of Soc. Servs.*, 165 N.C. App. 502, 505, 598 S.E.2d 707, 709 (2004) (citing *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992)). "Unchallenged findings of fact are presumed correct and are binding on appeal." *In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008) (citations omitted).

Plaintiff claims the following portions of the trial court's findings of fact are not supported by the evidence:

> Paragraph fifteen: Plaintiff took no action to have its motion to amend heard in this court.
>
> Paragraph seventeen: The allegations contained in plaintiff's proposed amended complaint were previously litigated between the same parties in bankruptcy court.
>
> Paragraph eighteen: There was an expectation on the part of the parties that a resolution would occur in a reasonably short period.
>
> Paragraph nineteen: Plaintiff has engaged in undue and unreasonable delay with respect to this matter.
>
> Paragraph twenty: Plaintiff's delay in this court appears deliberate and tactical.
>
> Paragraph twenty-one: Defendants have been prejudiced by the plaintiff's deliberate, tactical, undue and unreasonable delay.

Regarding paragraph fifteen, plaintiff states, "This finding of fact is not supported by any evidence before the court." However, the trial court found that on 17 November 2014, defendants requested that plaintiff's motion be placed on the 5 January 2015 civil motions calendar. Plaintiff does not challenge this finding, and it is presumed correct and binding on appeal. Moreover, the trial court's order indicates that it dismissed the claims not due to plaintiff's failure to take action to have its motion to amend heard, but because "[t]his case has languished in this Court since 2007 with no activity occurring."

[2] Plaintiff argues that paragraph seventeen is not supported by the evidence because the order from the bankruptcy court "states on its face that there was no prejudice to the plaintiff's [sic] filing an amended complaint and litigating the case on its merits." Plaintiff admits it did not file an amended complaint in bankruptcy court. Instead, plaintiff attempted to file an amended complaint in state court over one year after the bankruptcy court's order. " 'Under the doctrine of *res judicata*, a final judgment on the merits in a prior action in a court of competent jurisdiction precludes a second suit involving the same claim between the same parties or those in privity with them.' " *Green v. Dixon*, 137 N.C. App. 305, 307, 528 S.E.2d 51, 53 (quoting *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993)), *aff'd*, 352 N.C. 666, 535 S.E.2d 356 (2000). "[I]t is well settled in this State that '[a] dismissal under Rule 12(b)(6) operates as an adjudication on the merits unless the court specifies that the dismissal is without prejudice.' " *Hill v. West*, 189 N.C. App. 194, 198, 657 S.E.2d 698, 700 (2008) (quoting *Clancy v. Onslow Cty.*, 151 N.C. App. 269, 272, 564 S.E.2d 920, 923 (2002)). Here, although the trial court continued in paragraph seventeen to find that plaintiff's claims cannot be relitigated, the bankruptcy court dismissed plaintiff's claims without prejudice. Accordingly, there was no final judgment on the merits. Even though the findings of fact in paragraph seventeen do not support the trial court's conclusion of law regarding *res judicata*, the trial court's alternative conclusion of law—that plaintiff engaged in undue and unreasonable delay—supports its judgment.

Regarding paragraph eighteen, plaintiff asserts, "There is absolutely no basis or no evidence before the court which would support this conclusion." However, the trial court found, "The tolling agreement asserted by Plaintiff was of limited duration, namely, 'during th[e] period when we are attempting to resolve the issues,' in light of the expectation that a resolution would occur in a reasonably short period, not for the five or six year period of hibernation which occurred in this case." The evidence supports this finding. Moreover, the trial court further

stated, "The Court's findings with respect to the tolling agreement do not alter its decision on the motions to amend and the motion to dismiss in that even considering the potential existence of a tolling agreement, the Court would nevertheless deny Plaintiff's Motion[s] . . . and grant Defendants' Motion." Thus, the challenged finding had no impact on the court's conclusions of law or judgment.

Plaintiff submits the following argument pertaining to paragraph nineteen: "[P]laintiff respectfully contends that there is no evidence before the court to support this finding of fact." The trial court further provided in paragraph nineteen:

> The incident underlying this litigation occurred August 17, 2004, and an appraisal award was entered November 30, 2005. Despite rejection by Defendants of a portion of the appraisal award shortly after it was entered, Plaintiff did not seek confirmation of the award in this Court. Further, this action was administratively closed December 11, 2007, and there are no facts indicating that Plaintiff engaged in any activity with respect to this matter from the time of this Court's administrative closing of the file in December 11, 2007, until February 13, 2012, the time the adversary proceeding was filed in bankruptcy court. Nor are there any facts in the record providing a justification for such delay. Plaintiff's delay continued after the dismissal in bankruptcy court where Plaintiff never refiled in that court but waited over one year from that court's dismissal to move to amend in this Court. Plaintiff's delay continued by failing to calendar its motion to amend.

Plaintiff does not challenge these findings, which overwhelmingly support the trial court's conclusion that plaintiff engaged in undue and unreasonable delay.

Regarding paragraph twenty, "plaintiff contends that there is no evidence before the court which would justify this finding of fact." To the contrary, the record supports the trial court's finding that plaintiff's delay was tactical. Plaintiff filed suit in state court, waited over six years to file suit in federal court, and then tried to amend its federal claim in state court. Plaintiff does not challenge the remaining findings in paragraph twenty, which support the court's order.

Lastly, with respect to paragraph twenty-one, plaintiff states, "There is no basis in the evidence for any finding that the defendants were prejudiced in any way. The fact that the defendants have retained counsel

'with respect to this matter' is no support for a finding that the defendants have been prejudiced." The trial court further found in paragraph twenty-one,

> Defendants' counsel filed written motions and briefs in bankruptcy court. Defendants' counsel also attended the hearing in bankruptcy court. In addition, counsel for Defendants had to attend this Court's administrative session on October 17, 2014; thereafter calendared Plaintiff's Motion to Amend; filed their own motion to dismiss; and then briefed and argued the motions to amend and motions to dismiss. Further, after almost ten years, Plaintiff is now seeking to change the character of the claims by seeking treble damages, punitive damages, and attorneys' fees.

Again, plaintiff fails to challenge these findings of fact, which support the trial court's order.

In sum, there was competent evidence to support the challenged findings of fact, with the exception of paragraph seventeen. The remaining "[u]nchallenged findings of fact are presumed correct and are binding on appeal." *In re Schiphof*, 192 N.C. App. at 700, 666 S.E.2d at 500. The trial court's conclusions of law were proper in light of such facts and support its judgment.

B. Motions to Amend Complaint

[3] Plaintiff claims that the trial court abused its discretion in denying plaintiff's motions to amend "without any justifying reason," and "defendant has shown no prejudice from any delay." Plaintiff argues that there was no undue delay and "the proposed amendments were more in the order of supplemental proceedings involving facts which occurred after the Trial Court removed the case from the active trial docket."

"A ruling on a motion to amend a pleading following the time allowed for amending pleadings as a matter of course is left to the sound discretion of the trial court." *Wall v. Fry*, 162 N.C. App. 73, 80, 590 S.E.2d 283, 287 (2004) (citing *Isenhour v. Universal Underwriters Ins. Co.*, 345 N.C. 151, 154, 478 S.E.2d 197, 199 (1996)). "Undue delay is a proper reason for denying a motion to amend a pleading." *Id.* "A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980) (citing *Martin v. Martin*, 263 N.C. 86, 138 S.E. 2d 801 (1964)).

Rule 15(a) of the North Carolina Rules of Civil Procedure states,

> (a) Amendments.—A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within 30 days after service of the amended pleading, unless the court otherwise orders.

N.C. Gen. Stat. § 1A-1, Rule 15(a) (2013).

Here, the trial court listed numerous reasons to support its decision to deny plaintiff's motions to amend. The trial court found that plaintiff filed the current action on 16 August 2005 and did not file its motion to amend until 20 September 2013, over eight years later. It found that plaintiff "has engaged in undue and unreasonable delay with respect to this matter." As previously discussed, the abundant findings in paragraph nineteen support the trial court's decision. The trial court concluded as a matter of law the following:

> Whether to grant or deny a motion to amend is in the discretion of the trial court. Plaintiffs' [sic] Motion to Amend and Amended Motion to Amend should be denied on the grounds that they are futile, the claims were litigated in the adversary proceeding and are barred by the doctrine of res judicata. Alternatively, Plaintiffs' [sic] Motion to Amend and Amended Motion to Amend should be denied on the grounds that Plaintiff has engaged in undue and unreasonable delay. . . .

Evidenced by the findings listed throughout this opinion, the challenged action is not "manifestly unsupported by reason." *Clark*, 301 N.C. at 129, 271 S.E.2d at 63. Accordingly, the trial court did not abuse its discretion in denying plaintiff's motions to amend its complaint based on the court's conclusion that plaintiff engaged in undue and unreasonable delay. *See Wall*, 162 N.C. App. at 80, 590 S.E.2d at 287 ("Undue delay is a proper reason for denying a motion to amend a pleading.").

C. Rule 41(b)

[4] Next, plaintiff argues that the trial court erred in dismissing its case for failure to prosecute because "there is no evidence upon which a court could conclude that the plaintiff either manifested an intent to thwart the progress of the action or to engage in any delaying tactic." Further, plaintiff states that "although the trial court stated as a conclusion of law that sanctions short of dismissal would not suffice, it did not make findings of fact concerning the reasons that sanctions short of dismissal with prejudice would not suffice."

"The standard of review for a Rule 41(b) dismissal is '(1) whether the findings of fact by the trial court are supported by competent evidence, and (2) whether the findings of fact support the trial court's conclusions of law and its judgment.' " *Cohen v. McLawhorn*, 208 N.C. App. 492, 498, 704 S.E.2d 519, 524 (2010) (quoting *Dean v. Hill*, 171 N.C. App. 479, 483, 615 S.E.2d 699, 701 (2005)). "Unchallenged findings of fact are presumed to be supported by competent evidence, and are binding on appeal." *Id.* (quoting *Justice for Animals, Inc. v. Lenoir Cty. SPCA, Inc.*, 168 N.C. App. 298, 305, 607 S.E.2d 317, 322 (2005)) (quotations omitted).

"For failure of the plaintiff to prosecute . . . , a defendant may move for dismissal of an action or of any claim therein against him." N.C. Gen. Stat. § 1A-1, Rule 41(b) (2013). This Court has stated that the trial court must address the following three factors before dismissing for failure to prosecute under Rule 41(b): "(1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter; (2) the amount of prejudice, if any, to the defendant; and (3) the reason, if one exists, that sanctions short of dismissal would not suffice." *Wilder v. Wilder*, 146 N.C. App. 574, 578, 553 S.E.2d 425, 428 (2001).

Here, the trial court addressed all three factors. It found in paragraph nineteen that plaintiff "engaged in undue and unreasonable delay." It stated there are no facts indicating that plaintiff engaged in any activity with respect to this matter from December 2007 until February 2012 and no justification for such delay. Additionally, in paragraph twenty it found that plaintiff's delay appeared "deliberate" as plaintiff filed a complaint in state court, then chose to litigate in federal bankruptcy court, and then returned to state court.

The trial court addressed the second factor in paragraph twenty-one, stating, "Defendants have been prejudiced by Plaintiff's deliberate, tactical, undue, and unreasonable delay." The trial court found that plaintiff's extra-contractual claims arose over nine years ago, and defendants have had to retain counsel, file written motions, attend hearings, and argue

motions. Additionally, the trial court noted that plaintiff is now seeking to change the character of the claims.

Lastly, the trial court addressed the third factor in paragraph twenty-three, stating, "The Court has considered whether a less severe sanction than dismissal with prejudice is appropriate to serve the purpose of Rule 41(b), such as the exclusion of evidence or other sanctions, but the Court is unable to find anything short of dismissal with prejudice that would serve the purpose of Rule 41(b)."

In accordance with this Court's decision in *Wilder*, the trial court properly addressed each of the required factors. The findings of fact are supported by competent evidence, which in turn support the trial court's conclusions of law and judgment. The trial court did not err in granting defendants' motion to dismiss with prejudice based on Rule 41(b).

D. Rule 12(b)(1)

[5] Plaintiff also argues, "To the extent that the trial court dismissed the plaintiff's claim based upon an allegation of lack of subject matter jurisdiction, that dismissal is in error." Here, the trial court did not grant defendants' motion to dismiss based on lack of subject matter jurisdiction. Instead, the trial court stated in its first conclusion of law that it had subject matter jurisdiction, concluding that the 11 December 2007 Order "did not dismiss this action but simply administratively closed the file and removed it from this Court's active docket." Therefore, plaintiff's argument fails.

E. Statute of Limitations

[6] Lastly, plaintiff argues that to the extent the trial court determined in conclusion of law number two that the statute of limitations barred plaintiff's claim, it was error. Plaintiff maintains that the tolling agreement the parties entered into should be enforced. Here, the second conclusion of law addresses *res judicata* and fails to mention "statute of limitations." Additionally, although the trial court discussed "passage of time" in the context of undue and unreasonable delay, it was the bankruptcy court that concluded plaintiff's claims were barred by the statute of limitations. Thus, plaintiff's argument is without merit.

III. Conclusion

The trial court did not err in granting defendants' motion to dismiss with prejudice or in denying plaintiff's motions to amend its complaint.

AFFIRMED.

Chief Judge McGEE and Judge INMAN concur.

IN RE A.B.

[245 N.C. App. 35 (2016)]

IN THE MATTER OF A.B. AND J.B.

No. COA15-910

Filed 19 January 2016

1. Termination of Parental Rights—order—failure to plainly state standard of proof

On appeal from the trial court's order terminating respondent mother's parental rights to her two children, the Court of Appeals held that the trial court did not err when it only recited the proper standard of proof in finding of fact 13 and failed to affirmatively state in its order that all findings of fact were made pursuant to the proper standard of proof. While it would have been preferable for the trial court to plainly state its standard of proof for all findings of fact, the Court of Appeals concluded that the trial court used the correct standard of proof based on the language in finding of fact 13, the lack of evidence of an erroneous standard, and the oral rendition stating the appropriate standard.

2. Termination of Parental Rights—order—finding of facts—reference to allegations

On appeal from the trial court's order terminating respondent-mother's parental rights to her two children, the Court of Appeals disagreed with respondent's arguments regarding finding of fact 13—that the trial court improperly relied on allegations regarding neglect, failed to make its own independent determinations regarding the allegations, and relied on findings not supported by the evidence. The allegations referenced in finding 13 provided a relevant background for respondent's failure to make reasonable progress; the trial court made an independent determination of the facts and did not simply recite the allegations; and, even assuming finding of fact 13 was insufficient to support termination of respondent's parental rights, there were 69 unchallenged findings of fact that supported termination.

3. Termination of Parental Rights—order on remand—contradictions

On appeal from the trial court's order terminating respondent-mother's parental rights to her two children, the Court of Appeals rejected respondent's argument that the trial court's order on remand from the Court of Appeals contradicted the oral rendition at the initial hearing and the first order that ultimately resulted from that rendition.

Respondent's argument failed to acknowledge that the second order was the result of the Court of Appeals' remand and specific direction to the trial court to make its order internally consistent.

4. Termination of Parental Rights—order on remand—scope

On appeal from the trial court's order terminating respondent-mother's parental rights to her two children, the Court of Appeals rejected respondent's argument that the trial court exceeded the scope of the remand order from the Court of Appeals to clarify its findings of fact and conclusions of law. Respondent failed to make any argument that the changed facts in the new order were not supported by the evidence.

5. Termination of Parental Rights—order on remand—findings of fact—not contradictory

On appeal from the trial court's order terminating respondent-mother's parental rights to her two children, the Court of Appeals rejected respondent's argument that the trial court retained most of its contradictory findings from its first order after the Court of Appeals remanded the case for the court to clarify its findings of fact and conclusions of law. It is not unusual for an order terminating parental rights to include both favorable and unfavorable findings regarding the parent's progress toward reunification with the child. The trial court made numerous findings regarding respondent's progress but ultimately found that the progress was not enough. The trial court's findings supported its conclusions, which supported its ultimate decision to terminate respondent's parental rights.

6. Termination of Parental Rights—on remand—new evidence not received

On appeal from the trial court's order terminating respondent-mother's parental rights to her two children, the Court of Appeals held that the trial court did not abuse its discretion when it did not receive new evidence as to best interest. The Court of Appeals' prior opinion left the decision of whether to receive new evidence in the trial court's discretion, and there was no indication that respondent asked the trial court to receive new evidence on remand.

Appeal by respondent from order entered 5 June 2015 by Judge Elizabeth Trosch in District Court, Mecklenburg County. Heard in the Court of Appeals 17 December 2015.

Mecklenburg County Department of Social Services, Youth and Family Services, by Senior Associate County Attorney Kathleen Arundell Jackson, for petitioner-appellee.

Assistant Appellate Defender J. Lee Gilliam, for respondent-appellant.

Michael N. Tousey, for guardian ad litem.

STROUD, Judge.

Respondent-mother appeals order terminating her parental rights to her children, Jacob and Alexis.[1] For the following reasons, we affirm.

I. Background

On 3 February 2015, this Court issued the opinion, *In re A.B.*, ___ N.C. App. ___, 768 S.E.2d 573 (2015) ("*AB I*"). We summarized the history of the case in our prior opinion:

> The Mecklenburg County Department of Social Services, Youth and Family Services ("DSS") initiated the underlying juvenile case by filing a petition on 8 September 2010, alleging the juveniles were neglected and dependent. DSS asserted that respondent had an extensive history of taking Jacob to the emergency room for unnecessary treatment and that she was beginning to show a similar pattern with Alexis. DSS further stated that Alexis had recently been hospitalized because she had consumed some of Jacob's seizure medicine, suggesting that respondent had given the medicine to Alexis. Additionally, DSS reported that respondent was overwhelmed and overly stressed from parenting the juveniles, missed numerous appointments to address Jacob's behavioral issues, was unemployed and struggled financially, and had difficulty following doctors' instructions when providing routine treatments to the children at home. DSS took non-secure custody of the juveniles that same day.
>
> On or about 5 November 2010, DSS entered into a mediated agreement with respondent, establishing a case plan for reunification with the juveniles. Respondent's

1. Pseudonyms are used to protect the identity of the minors involved.

case plan required her to: (1) continue participating in an anger management program and demonstrate the skills learned; (2) complete parenting classes and demonstrate the skills learned; (3) maintain legal and stable employment providing sufficient income to meet the juveniles' basic needs; (4) maintain an appropriate, safe, and stable home for herself and the juveniles; (5) maintain weekly contact with her social worker; (6) cooperate with the guardian ad litem; and (7) attend the juveniles' medical and therapy appointments when able to do so. DSS and respondent also agreed to supervised visitation with the juveniles three times per week and a tentative holiday visitation plan.

After hearings on or about 7 January and 17 February 2011, the trial court entered an adjudication and disposition order holding that Alexis and Jacob were neglected juveniles. The court adopted concurrent goals of reunification and guardianship and set forth a case plan for respondent. The trial court adopted the mediated case plan developed by the parties and specifically directed respondent to undergo a complete psychological evaluation, obtain a domestic violence evaluation, and participate in counseling services or therapy.

DSS worked towards reunification of the juveniles with respondent, but in review and permanency planning orders entered 13 May and 31 August 2011, the trial court found respondent needed to further address her mental health and anger management problems. In a permanency planning order entered 19 January 2012, the court found that respondent had made some positive changes in that she was managing her anger, was "emotionally balanced" around the juveniles, and had realized that she needed "batterer's intervention treatment." But the court found that respondent still needed to complete her parenting capacity evaluation, show she could manage her mental health problems, and complete her domestic violence program. The court further found that there were no likely prospects for guardianship or permanent custody of the juveniles and set the permanent plan for the juveniles as reunification or adoption.

On 25 April 2012, the trial court entered a permanency planning order that ceased further efforts towards reunification of the juveniles with respondent, concluding respondent had failed to alleviate the conditions that caused the juveniles to be placed in the care and custody of DSS. The court directed that a Child Family Team ("CFT") meeting be held within thirty days of the order to develop recommendations for a permanent placement for the juveniles, and that DSS refrain from moving to terminate respondent's parental rights until after the court received the recommendations from the CFT. The trial court entered an order on 27 June 2012, directing DSS to proceed with an action terminating respondent's parental rights to the juveniles.

DSS filed petitions to terminate respondent's parental rights to the juveniles on 25 July 2012. DSS alleged grounds existed to terminate respondent's parental rights based on neglect, abandonment, failure to make reasonable progress to correct the conditions that led to the juveniles' removal from her care and custody, and willful failure to pay a reasonable portion of the cost of care for the juveniles while they were placed outside of her home. *See* N.C. Gen. Stat. § 7B–1111(a)(1)–(3), (7) (2013). The trial court heard the petitions on 25 March and 11 April 2013. At the conclusion of the hearing, the court found one ground to terminate respondent's parental rights: failure to make reasonable progress to correct the conditions that led to the juveniles' removal from her care and custody. However, the court concluded that terminating respondent's parental rights was not in the best interests of the juveniles and directed respondent's counsel to prepare a proposed order for the court and circulate the order to all parties.

On 23 September 2013, before the trial court had entered an order on the termination petitions, DSS filed a "Motion for Relief from Order and Motion to Consider Additional Evidence" pursuant to North Carolina Rule of Civil Procedure 60. *See id.* § 1A–1, Rule 60 (2013). DSS asked that the trial court reconsider its best interests conclusion based on allegations that respondent had misled the court by providing inaccurate information and

> testimony at the termination hearing, and that she had failed to comply with her case plan since the termination hearing. The trial court allowed the motion and held an additional hearing on 1 October and 4 November 2013 in which it allowed DSS to present additional dispositional evidence as to the best interests of the juveniles.
>
> By order entered 27 January 2014, the trial court terminated respondent's parental rights to the juveniles. The Court found that respondent had failed to make reasonable progress to correct the conditions that led to the juveniles' removal from her care and custody, and concluded that it was in the juveniles' best interests to terminate her parental rights. Respondent filed timely notice of appeal.

AB I, ___ N.C. App. at ___, 768 S.E.2d at 574-75.

In *AB I*, this Court addressed the issues on appeal primarily stemming from inconsistences in the order terminating respondent's parental rights. *See id.* at ___, 768 S.E.2d at 576-81. Ultimately this Court determined that

> [t]he contradictory nature of the trial court's findings of fact and conclusions of law prohibit this Court from adequately determining if they support the court's conclusions of law that (1) respondent failed to make reasonable progress toward correcting the conditions that led to the removal of the juveniles from her care and custody, and (2) terminating respondent's parental rights is in the juveniles' best interests. Accordingly, we reverse the termination order and remand to the trial court for entry of a new order clarifying its findings of fact and conclusions of law.

Id. at ___, 768 S.E.2d at 581-82.

On 5 June 2015, upon remand from this Court, the trial court entered an order terminating respondent's parental rights based upon North Carolina General Statute § 7B-1111(a)(2) for "willfully [leaving] the juvenile[s] in foster care or placement outside of the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal." N.C. Gen. Stat. § 7B-1111(a)(2) (2013). Respondent appeals.

II. Standard of Review

> Termination of parental rights proceedings are conducted in two stages: adjudication and disposition. In the adjudication stage, the trial court must determine whether there exists one or more grounds for termination of parental rights under N.C. Gen. Stat. § 7B–1111(a). This Court reviews a trial court's conclusion that grounds exist to terminate parental rights to determine whether clear, cogent, and convincing evidence exists to support the court's findings of fact, and whether the findings of fact support the court's conclusions of law. If the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary. However, the trial court's conclusions of law are fully reviewable *de novo* by the appellate court.
>
> If the trial court determines that at least one ground for termination exists, it then proceeds to the disposition stage where it must determine whether terminating the rights of the parent is in the best interest of the child, in accordance with N.C. Gen. Stat. § 7B–1110(a). The trial court's determination of the child's best interests is reviewed only for an abuse of discretion. Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.

AB I, ___ at ___, 768 S.E.2d at 575-76 (citations, quotation marks, and brackets omitted).

III. Standard of Proof

[1] Respondent first contends that "the trial court stated a standard of proof for only one finding[,] (original in all caps), but "*/a/ll* [a]djudicatory [f]indings [m]ust [b]e [b]y [c]lear [a]nd [c]onvincing [e]vidence." (Emphasis added.) Respondent argues that the trial court's failure to affirmatively state in the order that *all* of the findings of fact, not just finding of fact 13, were made pursuant to the proper standard of proof was erroneous. We agree that all findings of fact must be supported by clear, cogent, and convincing evidence. *See* N.C. Gen. Stat. § 7B-1109 (2013) ("[A]ll findings of fact shall be based on clear, cogent, and convincing evidence.")

Just as respondent noted, finding of fact 13 recites the appropriate standard. Finding of fact 13 provides "[t]hat the Department of Social Services has substantially proven the facts that were alleged in paragraphs a-k of the termination of parental rights petition by clear, cogent and convincing evidence." Furthermore, the order does not mention any different standard of proof than as stated in finding of fact 13. Lastly, the trial court stated in its rendition before entry of the first order, "Well, having announced findings previously of facts established by clear, cogent, and convincing evidence that there are grounds to terminate the parental rights of the Respondent-Mother for failing to make reasonable progress under the circumstances, to ameliorate the conditions that brought the children into custody . . . ." No new evidence was taken upon remand, and thus there is no reason to conclude that the trial court used the wrong standard of proof in the current order. This Court has previously determined that

> [a]lthough the trial court should have stated in its written termination order that it utilized the standard of proof specified in N.C. Gen. Stat. § 7B–1109(f), the fact that the trial court *orally indicated that it employed the appropriate standard* and the fact that the language actually used by the trial court is reasonably close to the wording that the trial court should have employed satisfies us that the trial court did, in fact, make its factual findings on the basis of the correct legal standard.

In re M.D., 200 N.C. App. 35, 39, 682 S.E.2d 780, 783 (2009) (emphasis added).

Therefore, while we agree it would have been preferable for the trial court to plainly state its standard of proof for *all* of the findings of fact, based upon the language in finding of fact 13, the lack of evidence of an erroneous standard, and the oral rendition stating the appropriate standard, we conclude that the trial court used the correct standard of proof. This argument is overruled.

IV. Finding of Fact 13

[2] Respondent next makes four arguments regarding finding of fact 13. Again, finding of fact 13 states "[t]hat the Department of Social Services has substantially proven the facts that were alleged in paragraphs a-k of the termination of parental rights petition by clear, cogent and convincing evidence." Respondent first contends that paragraphs a-k[2] in the

2. It appears that paragraphs a-k are actually subparagraphs of paragraph 6 of the petition, since only one paragraph of the petition has subparagraphs a-k.

petition to terminate are allegations regarding the ground of neglect and because the trial court failed to find neglect as a basis for termination, it was inconsistent to find the facts supporting neglect by reference to the petition.

Indeed, just as respondent argues, subparagraphs a-k of paragraph 6, allege "[t]hat the respondent parents have neglected the said juvenile as defined in G.S. Section 7B-101(15) in that the respondent parents have failed to provide proper care, supervision, and discipline for said juvenile and have abandoned said juvenile. . . ."

Yet when we consider the substance of subparagraphs a-k, they are actually providing a general background of the case, which would be applicable no matter the ground for termination. Subparagraphs a, b, e, and k address the procedural history including the reasons for the initial petition and some prior determinations made by the trial court. Subparagraphs c and d are regarding one of the children's putative fathers. Subparagraph f summarizes respondent's case plan. Subparagraphs g-h note respondent's inconsistency in completing her case plan and complying with a prior court order. Subparagraph i addresses respondent's compliance with her case plan such as completing a parenting class and regularly visiting the children, and subparagraph j is regarding respondent's lack of employment. Therefore, the trial court could properly rely upon these allegations for determinations other than finding the ground of neglect, since they also provide a relevant background for considering the ground for termination the trial court did find, failure to make reasonable progress. This argument is overruled.

Heavily relying upon *In re O.W.*, 164 N.C. App. 699, 596 S.E.2d 851 (2004), respondent also contends that the trial court should not have wholesale adopted subparagraphs a-k but instead should have made its own independent determination.

> While petitioner is correct that there is no specific statutory criteria which must be stated in the findings of fact or conclusions of law, the trial court's findings must consist of more than a recitation of the allegations. In all actions tried upon the facts without a jury the court shall find the facts specifically and state separately its conclusions of law thereon.

Id. at 702, 596 S.E.2d at 853 (citations, quotation marks, and ellipses omitted)).

But this Court has recently noted that it is not necessarily error

> for a trial court's findings of fact to mirror the wording of a party's pleading. It is a longstanding tradition in this State for trial judges to rely upon counsel to assist in order preparation. It is no surprise that parties preparing proposed orders might borrow wording from their earlier submissions. We will not impose on our colleagues in the trial division an obligation to comb through those proposed orders to eliminate unoriginal prose.

In re J.W., ___ N.C. App. ___, ___, 772 S.E.2d 249, 251, *disc. review denied*, ___ N.C. ___, 776 S.E.2d 202 (2015) (citation and quotation marks omitted).

Upon our examination of the entire record and transcripts, we have been able to determine that the trial court did go through the evidence thoughtfully and did not just accept the petition's allegations. As we noted when this same case was before us previously,

> [w]e also understand that the initial drafts of most court orders in cases in which the parties are represented by counsel are drafted by counsel for a party. Unfortunately, in North Carolina, the majority of District Court judges have little or no support staff to assist with order preparation, so the judges have no choice but to rely upon counsel to assist in order preparation.

A.B. I, ___ N.C. App. at ___, 768 S.E.2d at 579. But the trial court is still ultimately responsible for the contents of the order:

> We again caution the trial court that its order, upon which the trial judge's signature appears and which we review, must reflect an adjudication, not mere one-sided recitations of allegations presented at the hearing. *In re J.W.*, ___ N.C. App. ___, ___, 772 S.E.2d 249, 251 (2015) ("[W]e will examine whether the record of the proceedings demonstrates that the trial court, through the processes of legal reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case.").

In re M.K. (I), ___ N.C. App. ___, ___, 773 S.E.2d 535, 538-39 (2015).

Although finding of fact 13 certainly includes some "unoriginal prose[,]" *id.*, the trial court made 70 findings of fact. The trial court

referred to the allegations from DSS's petitions by reference to subparagraphs a-k in one of seventy findings, so it is clear that the trial court made an independent determination of the facts and did "more" than merely "recit[e] the allegations." *In re O.W.*, 164 N.C. App. at 702, 596 S.E.2d at 853. This argument is overruled.

Respondent then argues that various small portions of subparagraphs a-k were not supported by the evidence. But not even respondent contends that these portions of subparagraphs a-k were essential to the determination made by the trial court to terminate. Instead, respondent argues the allegations of paragraphs "a-k of the termination petition were not supported by clear and convincing evidence. They cannot be used to support termination grounds." Rather than engage in a lengthy discussion of each and every contested background fact in subparagraphs a-k, which are adopted by Finding of Fact 13, we will agree, *arguendo*, with respondent that finding of fact 13 alone would not be sufficient to support a ground for termination. But there are still 69 unchallenged findings of fact which could support the ground for termination.

Lastly, respondent contends that due to the numerous issues with finding of fact 13 and because it cannot be used to support the ground for termination, "the ground must be reversed." We disagree, since approximately 98.5% of the trial court's findings of fact are unchallenged and therefore binding on appeal. *See generally In re J.K.C.*, 218 N.C. App. 22, 26, 721 S.E.2d 264, 268 (2012) ("The trial court's remaining unchallenged findings of fact are presumed to be supported by competent evidence and binding on appeal.") Thus even if we completely disregard finding of fact 13 as respondent requests, the other unchallenged findings of fact may support the trial court's determination. This argument is overruled.

V. Changes in Order on Appeal

Respondent argues that the trial court's findings of fact and conclusions of law in the order on appeal must be consistent with any prior orders and oral renditions. Respondent raises essentially two arguments: (1) the trial court's order on remand from this Court contradicts the oral rendition at the initial hearing and the first order which ultimately resulted from that rendition, and (2) "[t]he [t]rial [c]ourt [e]xceeded [t]he [s]cope [o]f [t]he [r]emand [o]rder." We address both arguments in turn.

[3] Respondent argues that the trial court's second order, currently on appeal, contradicts both the oral rendition after the initial hearing and the first order which was entered after that rendition. But respondent's argument fails to acknowledge that the second order was the result of

this Court's remand and specific direction to the trial court to make its order internally consistent:

> If the only problem in the order was one poorly worded conclusion of law, we might be able to determine that this conclusion of law contains a clerical error that could be remedied by a direction to correct it on remand. But the internal inconsistencies of the order go far beyond one sentence. As noted above, there are contradictory findings as to respondent's mental health care and her domestic violence issues[, and] contradiction[s] to its ultimate conclusions regarding grounds for termination and the juveniles' best interests . . . .

See AB I, ___ N.C. App. ___, 768 S.E.2d at 579. The only possible way for the trial court to make a consistent order would naturally require some findings "contradicting" the oral rendition and the first order which resulted in the remand in the first place. The order had to clear up the internal contradictions from the prior order, and this would logically require leaving out some of the findings which the trial court presumably did not intend to include in the prior order, but, thanks to errors in drafting as noted in our first opinion, ended up in the prior order. *See id.* As this argument ignores the procedural posture of this case, we find it to be without merit.

[4] Respondent next contends that "this Court instructed the trial court to enter 'a new order clarifying its findings of fact and conclusions of law[,]' " and the trial court went far beyond clarification. Respondent specifically directs us to two findings of fact that were so changed upon appeal they went far beyond "clarification," but respondent's argument does not address the sufficiency of the evidence to support the findings but only the fact that the findings in the first order were different than those in the second. When the word "clarifying" is read within the entire context of *AB I*, it is evident that this Court remanded this case for the trial court to make whatever changes necessary to have an internally consistent order. The trial court needed to make the findings which the trial court, in its role as fact-finder and judge of credibility of the evidence, determined were supported by the evidence. *See AB I*, ___ N.C. App. ___, 768 S.E.2d 573, 575-82. The first order contained findings of fact that did not logically support the conclusions of law. *See id.* at ___, 768 S.E.2d at 579. Furthermore, the conclusions of law were inconsistent with one another. *See id.* This Court remanded the order for the trial court to draft a consistent order, *see id.*, ___ N.C. App. ___, ___, 768 S.E.2d at 579-82, which would necessarily require significant changes

from the first inconsistent order. Respondent notes that "[c]larify means 'to make (something) easier to understand' " and that is exactly what this Court requested, an order that was internally consistent and thus reviewable. We would have hoped, given this instruction in our prior opinion, that the new order now on appeal would have been more carefully drafted, but respondent has not argued that the changed facts are not supported by evidence, and thus this argument is overruled.

VI. Contradictory Findings of Fact

[5] Respondent next contends that "the trial court retained most of its contradictory findings from the prior order." (Original in all caps.) Again, we turn to *AB I:*

> It is not unusual for an order terminating parental rights to include both favorable and unfavorable findings of fact regarding a parent's efforts to be reunited with a child, and the trial court then weighs all the findings of fact and makes a conclusion of law based upon the findings to which it gives the most weight and importance.

Id. at ___, 768 S.E.2d at 578. Thus, "contradictory" findings of fact are "not unusual" in a termination order because in many cases parents take many positive steps along with many negative ones. Almost always, the parent will present evidence of her progress and improvement, and in many cases, she has actually made some progress. Likewise, the petitioner will present evidence regarding the parent's failures and omissions. The trial court's role is to determine the credibility of all of this evidence and to weigh all of it and then to make its findings of fact accordingly. Although the evidence will be inconsistent, the trial court's ultimate order must be consistent in its findings of fact such that they will support its conclusions of law to come to an ultimate determination. *See id.*

While respondent directs our attention to numerous "inconsistent" findings of fact and argues regarding various changes between the first order and the one currently on appeal, respondent does not actually challenge the sufficiency of the evidence to support the findings of fact nor does respondent make an argument that the findings of fact as currently drafted fail to support the determination that respondent failed to make reasonable progress. North Carolina General Statute § 7B-1111(a)(2) provides that a court may terminate one's parental rights when "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances

has been made in correcting those conditions which led to the removal of the juvenile. N.C. Gen. Stat. § 7B-1111(a)(2) (2013). "[W]illfulness is not precluded just because respondent has made some efforts to regain custody of the child." *In re D.H.H.*, 208 N.C. App. 549, 553, 703 S.E.2d 803, 806 (2010) (citation and quotation marks omitted).

Although the trial court's findings did note respondent's desire to keep her children and her attempts to correct conditions which led to her children's removal, the trial court also found:

> 10. The Court identified the primary issues Ms. [Smith] was facing at the time of the children's removal to be issues of Mental Health. The goals for the mother have been developing the capacity, skills and cultivating the support necessary to manage aggression and anger and conflict in a way that did not result in aggressive outbursts that impacted the emotional and physical well-being of the children.
>
> 11. That over the course of time the issues of domestic violence with the mother as a primary aggressor became apparent. After the birth of . . . [Kyle] . . . these issues were required by the Court to be addressed during the time that the children had been in custody prior to filing the termination petitions.
>
> . . . .
>
> 15. That . . . [although respondent] has cooperated and began outpatient psycho-therapy with Linda Avery[,] . . . Ms. [Smith] was not completely forthcoming about the circumstances that brought the children into custody or the issues of violence in her relationships . . . and that Ms. Avery concluded that Ms. [Smith] had not made discernible progress in achieving goals that they had set for treatment.
>
> 16. . . . . despite [her positive desire], the mother voluntarily withdrew herself from services with Ms. Linda Avery contrary to clinical recommendations. Failure to provide complete and honest information about the injuries sustained by [Alexis] to the clinician in addition to failure to provide honest information about the persistence of violence in her relationships, resulted in a treatment plan that was inadequate to assist Ms.

[Smith] [in] alleviat[ing] the conditions of mental illness and aggressive outbursts, ultimately undermining the efficacy and progress of treatment. Ms. [Smith]'s failure to participate consistently in sessions with Ms. Avery further impeded progress in treatment goals.

. . . .

24. Initially, Ms. [Smith] was not forthcoming about issues of Domestic Violence. . . . After Ms. [Smith] had been properly assessed and screened for the issues of domestic violence, she was found to be a predominant aggressor who was not appropriate for victim services, but could benefit from batter[er]'s intervention treatment program and was referred to NOVA, a state certified batter[er]'s intervention program[.]

25. That the mother began NOVA treatment on three (3) separate occasions prior to November 2012 and that she was unsuccessfully discharged and terminated in January 2012, May 2012 and September 2012 due to excessive absences.

26. That the mother has been actively engaged in NOVA services since November 2012 . . . .

27. That Tim Bradley of NOVA is not providing direct counseling to Ms. [Smith] . . ., but has had interactions with . . . [her] in his capacity as case manager. In Mr. Bradley's opinion Ms. [Smith] has not developed enough relationship skills to be in an intimate partner relationship with Mr. [Jones] . . . .

. . . .

35. Ms. [Smith] was the person responsible for the neglect that the Court found at adjudication in the underlying proceedings and has willfully left [Jacob] and [Alexis] . . . in foster care for twelve (12) months without showing to the satisfaction of the Court that reasonable progress has been made in alleviating the conditions that brought her children into the custody of the Department of Social Services. These children have been in custody and in various placements for over two years solely because the mother, throughout that time, engaged in a pattern of self-defeating cycles

of dishonesty with therapists, social services professionals, the court and herself. Reunification could not be achieved over that two year period because Ms. [Smith] continued to engage in a pattern of violence with her paramours, family members and caretakers to her children. These children were willfully left in foster care for nearly two years as Ms. [Smith] attempted to conceal unfavorable information from the Court and avoid taking any productive, consistent, and relevant action to alleviate the conditions that brought the children into custody.

. . . .

38. Through the majority of time that these children have been in custody, . . . [respondent] has engaged in a pattern of short progress followed by long periods of regression in mental health and anger management. . . .

39. That . . . [respondent] is not currently able to provide for the basic shelter and the children are in need of permanency[.]

. . . .

41. That when . . . Ms. [Smith] first gave testimony at the termination proceedings on 25 March and 11 April 2013, she denied that she had an intimate partner and specifically denied being in a relationship with [Mr. Jones] in early 2013. Ms. [Smith] testified at that time that she had not been in an intimate partner relationship with him in the past four or five months.

42. The respondent-mother has impeached herself, stating not only that they had been in a voluntary intimate relationship, but that they were cohabitating from February 2013 until sometime early in July 2013.

43. That since 11 April 2013 there were four 911 calls for service involving domestic disputes between Mr. [Jones] and Ms. [Smith].

44. That Ms. [Smith] was the primary aggressor in each of those events.

. . . .

46. That police responded to Mr. [Jones'] residence, but Ms. [Smith] substantially minimized the nature of the conflict and denied telling law enforcement that she had lived at that residence.

47. That Ms. [Smith] denied to Ms. Mitchell that she was living at Mr. [Jones'] residence at any point immediately prior to the police response on 25 July 2013.

48. That only when confronted with collateral information from Charlotte-Mecklenburg Police reports did Ms. [Smith] acknowledge the significant aspects of those conflicts including that she was throwing the personal property of Mr. [Jones] from the balcony of Mr. [Jones'] residence . . . .

49. That during Ms. [Smith]'s third enrollment in batterer intervention classes with NOVA over the period of January through July 2013, the respondent-mother did not disclose the nature of her relationship with Mr. [Jones] or that they were cohabitating.

50. That the respondent-mother did not disclose all of the altercations that occurred between the two of them, but that during her recent participation in NOVA, Mr. Tim Bradley observed Ms. [Smith] to be defensive and to demonstrate no insight in the conduct that occurred on 7 April 2013, 25 July 2013, 1 August 2013, and 22 August 2013.

51. That Mr. Bradley received documentation and explanation about one of the respondent-mother's absences as the result of an illness requiring medical attention. Ms. [Smith] failed [to] justify her other absences and for the third time she was terminated from NOVA for excessive absences.

52. That Ms. [Smith] had not benefited from the information provided in NOVA in the cumulative 21 sessions attended in the three opportunities she had to complete batterer intervention treatment.

53. That Ms. [Smith] continues to require therapy to address causes of her aggressive conduct.

54. That even today Ms. [Smith] minimizes the significance of her outbursts on those four known occasions for which law enforcement was called to respond to domestic disturbances in 2013 between Ms. [Smith] and Mr. [Jones].

55. That Ms. [Smith] was provided with referrals to at least two other programs to address her need for batterer intervention and that despite her ability since receiving those referrals and reports prior to today, she has failed to enroll in such a program and take reasonable steps to address the issues of domestic violence.

56. That the respondent-mother had not been entirely forthcoming with Mr. McQuiston regarding events that had caused her children to come into custody during their sessions. She had not informed him of her participation in batterer intervention treatment and collateral information subsequently provided to him in the form of Dr. Bridgewater's evaluation. The failure of the respondent-mother to provide information impacted Mr. McQuiston's ability to develop appropriate treatment goals to assist Ms. [Smith] in addressing what he described as self-defeating cycles of the destructive use of anger.

57. The Court is not convinced that the respondent-mother is providing him with the information that he would need to provide her with meaningful assistance to address the conditions of domestic violence and increasing her capacity to manage her anger in a way that would be necessary to [e]nsure or build her capacity to safely and effectively parent her children.

58. That despite the respondent-mother having reported to her clinicians and to the Court she received substantial benefit in stabilizing her mood while complying with prescription psychotropic medications, she has for at least the second time ceased compliance with her prescribed psychotropic medications without the consultation or input from her psychiatrist, therapist, or psychologists.

59. That since 1 April 2013, the respondent-mother has had significant conflicts with the caretakers of her

children around the scheduling and execution of her visitation rights.

60. That those are conflicts created by the respondent-mother's own unrealistic demands on those caretakers or last minute and off-the-schedule visitation.

61. The respondent mother lacked the ability, tools, and interpersonal relationship skills to negotiate those conflicts and resolves the conflicts without the assistance and intervention of DSS.

. . . .

63. That Ms. [Smith] continues to engage in self-defeating cycles of loss of emotional control and the destructive use of anger in her interpersonal relationships.

64. Ms. [Smith]'s conduct since April 2013 combined with her voluntary cessation of her mental health treatment and medication intervention indicates that self-defeating pattern of emotional volatility and use of anger is unlikely to be ameliorated in the foreseeable future.

65. That Ms. [Smith] has also created significant conflict in her relationship with each of the care providers around visitation and parenting strategies.

. . . .

67. The [caretakers] are committed to providing a permanent, safe and stable home for [Alexis] and [Jacob]. The [caretakers] have a strong bond to the juveniles and juveniles have a strong bond to . . . [them].

. . . .

70. It is in [Jacob] and [Alexis'] best interests that the parental rights of the respondent-mother . . . be terminated.

The trial court then concluded:

2. That there are grounds to terminate the parental rights of the parents in that the parents have willfully left [Jacob] and [Alexis] . . . in foster care for more than twelve (12) months without showing to the

> satisfaction [of] the Court that reasonable progress has been made in correcting the conditions which le[] d the children to be removed . . . .
>
> 3. Adoption is the permanent arrangement that is most consistent with [Jacob] and [Alexis]'s needs for a permanent home within a reasonable period of time.
>
> 4. It is in [Jacob] and [Alexis'] best interests that the parental rights of the respondent mother . . . be terminated[.]

Thus, while the trial court acknowledged and even made numerous findings regarding respondent's progress, the progress was ultimately not enough. It is also clear from the findings of fact that the trial court did not find respondent's evidence of her progress in some areas to be credible. The findings support the conclusions, which in turn support the ultimate determination to terminate. This argument is overruled.

VII. New Evidence

[6] Lastly, respondent contends "the trial court abused its discretion when it did not receive new evidence as to best interest." (Original in all caps.) Respondent argues that "[i]t was not possible for the trial court to formulate a reasoned best interest finding regarding children this young on information which was three years old[,]" particularly in regards to the children's bond with respondent. We agree that with the passage of time, respondent's and the children's circumstances may change, perhaps in ways that would be relevant to the decision to terminate parental rights. But the trial court was under no obligation to consider new evidence on remand, since our prior opinion left the decision of whether to receive additional evidence entirely within the discretion of the trial court. *See AB I*, ___ N.C. App. at ___, 768 S.E.2d at 582 ("The trial court may receive additional evidence on remand, within its sound discretion."). The trial court is in a far better position than this Court to determine whether additional evidence may be useful in a case of this type. In addition, the record does not indicate that respondent made any motions for the trial court to receive additional evidence nor does respondent argue on appeal that any such request was denied. Respondent has not demonstrated how the trial court abused its discretion. This argument is overruled.

VIII. Summary

For the foregoing reasons, we affirm.

AFFIRMED.

Judges DIETZ and TYSON concur.

IN THE MATTER OF A.L.

No. COA15-693

Filed 19 January 2016

1. Termination of Parental Rights—subject matter jurisdiction—voluntary dismissal

Where the Department of Social Services voluntarily dismissed a neglected and dependent juvenile petition after the mother relinquished her parental rights and the district court thereafter entered an order dismissing the matter, concluding that the petition was mooted by the relinquishment, the district court no longer had subject matter jurisdiction over the case and its subsequent custody review orders were void.

2. Termination of Parental Rights—subject matter jurisdiction—new filing and new summons

A district court re-acquired subject matter jurisdiction over a termination of parental rights case following a voluntary dismissal where the Department of Social Services (DSS) initiated a new action by issuing a new summons and filing a termination petition, and DSS had standing to file the petition due to the mother's relinquishment of custody of the child to DSS.

3. Termination of Parental Rights—findings—cost of care of juvenile—respondent's failure to pay

In a termination of parental rights case where respondent contended that the Department of Social Services did not produce significant evidence to support its findings independent of void review orders, clear, cogent, and convincing evidence properly before the court supported the findings of fact necessary to support the court's conclusion of law concerning the reasonable portion of the cost of

care for the juvenile. In addition, the district court made findings establishing that respondent failed to pay a reasonable amount of child support even though he had the ability to do so.

4. Termination of Parental Rights—conclusion—failure to provide support

The district court did not err by terminating respondent's parental rights for failure to provide support despite respondent's contention that the trial court's conclusion was erroneous for numerous reasons. While the Department of Social Services (DSS) did not have jurisdiction for a time, it was not divested of custody of the child because the mother's relinquishment of custody specifically gave custody to DSS. The ground of failure to provide support was based upon child support enforcement orders in a different action which were not void. In addition, the district court made findings establishing that respondent failed to pay a reasonable amount of child support even though he had the ability to do so.

5. Termination of Parental Rights—findings—previous adjudication

In a termination of parental rights case, the district court erred by finding as fact that the child had previously been adjudicated dependent. However, the error was not prejudicial because the district court properly terminated respondent's parental rights on another ground.

Appeal by Respondent-father from orders entered 23 February 2015 by Judge Michael A. Stone in Hoke County District Court. Heard in the Court of Appeals 29 December 2015.

The Charleston Group, by R. Jonathan Charleston, Jose A. Coker, and Keith T. Roberson, for Petitioner Hoke County Department of Social Services.

Parker Poe Adams & Bernstein LLP, by Mary Katherine H. Stukes, for Guardian ad Litem.

Leslie Rawls for Respondent-father.

STEPHENS, Judge.

Respondent-father appeals from the district court's orders terminating his parental rights to A.L. ("Arianna").[1] After careful review, we affirm.

Factual and Procedural Background

In December 2011, the Hoke County Department of Social Services ("DSS") took newborn Arianna into nonsecure custody and filed a juvenile petition alleging that she was neglected and dependent. According to the petition, Arianna's mother had a long history of untreated substance abuse, and Arianna tested positive for marijuana and cocaine at birth. The petition also alleged that six previous children had been removed from the mother's custody and that she had relinquished her parental rights to five children. The identity of Arianna's father was unknown at the time.

At the 17 February 2012 session of Juvenile Court, DSS voluntarily dismissed the petition after the mother relinquished her parental rights to Arianna. At the time, the identity of Arianna's father was still unknown. Therefore, Arianna remained in DSS custody. The district court subsequently entered a dismissal order on 20 September 2012.

A placement review hearing was conducted on 7 September 2012, by which time the mother had identified Respondent-father as Arianna's putative father and DNA testing had confirmed Respondent-father's paternity. The district court entered a corresponding review order on 5 November 2012. In the order, the district court found that Respondent-father had a DSS history involving his four children with "Nancy."[2] The court found that Respondent-father's relationship with Nancy was the main impediment to Respondent-father obtaining custody of Arianna because the couple had a long history of domestic violence. Despite a no-contact order, Respondent-father was unable to keep Nancy out of his home. Therefore, the district court maintained custody of Arianna with DSS, but nonetheless implemented a permanent plan of reunification of Arianna with Respondent-father.

The district court subsequently changed Arianna's permanent plan to adoption. On 15 May 2014, DSS filed a petition to terminate Respondent-father's parental rights to Arianna, alleging the following grounds for termination: (1) failure to make reasonable progress toward correcting

1. A stipulated pseudonym is used to protect the identity of the juvenile and for ease of reading. *See* N.C.R. App. P. 3.1(b).

2. "Nancy" is a pseudonym.

the conditions that led to removal; (2) willful failure to pay a reasonable portion of the cost of care for Arianna; (3) failure to legitimate Arianna; (4) dependency; and (5) willful abandonment. *See* N.C. Gen. Stat. § 7B-1111(a)(2), (3), (5)-(7) (2013).

Following a hearing, the district court entered an order on 23 February 2015 terminating Respondent-father's parental rights based upon the following grounds: (1) failure to make reasonable progress toward correcting the conditions that led to the placement of Arianna in DSS custody; (2) willful failure to pay a reasonable portion of the cost of care for Arianna; and (3) willful abandonment.[3] In a separate disposition order entered the same day, the district court concluded that it was in Arianna's best interest to terminate Respondent-father's parental rights. From both orders, Respondent-father appeals.

Discussion

I. The district court's jurisdiction to enter certain custody review orders

[1] Respondent-father first argues that the district court was divested of jurisdiction on 20 September 2012 when the court entered its order dismissing the original juvenile petition and that the court did not re-acquire jurisdiction until DSS filed its petition to terminate parental rights on 15 May 2014. Respondent-father further contends that because the district court lacked jurisdiction during this time, any custody review orders entered from 20 September 2012 to 15 May 2014 were void. We agree.

"A . . . court's subject matter jurisdiction over all stages of a juvenile case is established when the action is initiated with the filing of a properly verified petition." *In re T.R.P.*, 360 N.C. 588, 593, 636 S.E.2d 787, 792 (2006). Following the dismissal of an action, however, the

3. In reviewing the record, we have found two discrepancies between the filed termination order and the court's oral rendition of its decision at the hearing. At the hearing, the district court also found dependency as a ground for termination, but that ground is absent from the order. Additionally, despite the court's finding of willful abandonment in the termination order, DSS chose not to pursue this ground at the hearing. Further, the court did not find willful abandonment as a ground for termination in its oral rendition at the hearing. However, we conclude that any error on the part of the district court with respect to these discrepancies is not prejudicial. As explained in the sections that follow, the district court was justified in terminating Respondent-father's parental rights on a different ground. If this Court determines that the findings of fact support one ground for termination, we need not review the other challenged grounds, *see In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426 (2003), because only one statutory ground is necessary to support the termination of parental rights. *See In re Pierce*, 67 N.C. App. 257, 261, 312 S.E.2d 900, 903 (1984).

district court no longer has jurisdiction. *See In re O.S.*, 175 N.C. App. 745, 749, 625 S.E.2d 606, 609 (2006) ("DSS then dismissed its juvenile petition. Without the juvenile petition, the district court no longer had any jurisdiction over the case."). In this case, DSS voluntarily dismissed the juvenile petition after the mother relinquished her parental rights, and the district court thereafter entered an order dismissing the matter, concluding that the petition was mooted by the relinquishment. Because the district court no longer had subject matter jurisdiction over the case, its subsequent custody review orders were void.[4] *See In re T.R.P.*, 360 N.C. at 598, 360 S.E.2d at 789-90 (concluding that because the district court lacked subject matter jurisdiction, the review hearing order was void *ab initio*).

[2] Nevertheless, Respondent-father concedes that, even if the district court did not have jurisdiction to enter any custody review orders after the juvenile action was dismissed, it re-acquired jurisdiction when DSS filed the petition to terminate his parental rights on 15 May 2014.

The Juvenile Code provides

> two means by which proceedings to terminate an individual's parental rights may be initiated: (1) by filing a petition to initiate a new action concerning the juvenile; or (2) in a pending child abuse, neglect, or dependency proceeding in which the district court is already exercising jurisdiction over the juvenile and parent, by filing a motion to terminate pursuant to N.C. Gen. Stat. § 7B-1102.

In re S.F., 190 N.C. App. 779, 783, 660 S.E.2d 924, 927 (2008). "[W]hen a *petition* to terminate is filed, the petition initiates an entirely new action before the court, rather than simply continuing a long process begun with the petition alleging abuse, neglect, or dependency." *Id.* (emphasis in original). Indeed, when a petition to terminate is filed, N.C. Gen. Stat. § 7B-1106 requires the issuance of a new summons, and the summons is the means by which the district court establishes subject matter

4. In reaching this result, we reject the contention by DSS and the Guardian ad Litem ("GAL") that the district court never lost jurisdiction over the matter because DSS became Arianna's custodian when the mother relinquished her parental rights. It appears that DSS and the GAL conflate jurisdiction and custody. While it is true that DSS acquired legal custody of Arianna by virtue of the relinquishment, it does not necessarily follow that the relinquishment gave the district court jurisdiction over an action that had been dismissed. Nonetheless, as we explain below, while there was a gap in jurisdiction, the district court properly re-acquired subject matter jurisdiction when DSS filed the termination of parental rights petition.

jurisdiction over the matter. *Id.* at 783-84, 660 S.E.2d at 927-28. By contrast, a motion to terminate in an ongoing juvenile case requires only notice of hearing, as the district court maintains jurisdiction "because of the ongoing proceeding[.]" *Id.* at 783, 660 S.E.2d at 927.

In the case at bar, DSS initiated a new action by issuing a new summons and filing a petition to terminate Respondent-father's parental rights. Nevertheless, in order for the district court to obtain subject matter jurisdiction, the petitioner must also have standing to file the petition. *See In re E.X.J.*, 191 N.C. App. 34, 39, 662 S.E.2d 24, 27 (2008) ("If DSS does not lawfully have custody of the children, then it lacks standing to file a petition or motion to terminate parental rights, and the [district] court, as a result, lacks subject matter jurisdiction.") (citation omitted), *affirmed per curiam*, 363 N.C. 9, 672 S.E.2d 19 (2009). Standing to file a termination petition is governed by N.C. Gen. Stat. § 7B-1103(a), which provides, in pertinent part:

> A petition or motion to terminate the parental rights of either or both parents to his, her, or their minor juvenile may only be filed by one or more of the following:
>
> . . . .
>
> (4) Any county department of social services, consolidated county human services agency, or licensed child-placing agency to which the juvenile has been surrendered for adoption by one of the parents or by the guardian of the person of the juvenile, pursuant to [section] 48-3-701.

N.C. Gen. Stat. § 7B-1103(a)(4) (2013). In this case, Arianna's mother relinquished her parental rights to Arianna and surrendered her for adoption. *See* N.C. Gen. Stat. § 48-3-701 (2013). By virtue of the mother's relinquishment, DSS had standing to file the termination petition pursuant to section 7B-1103(a)(4).

Thus, we hold that the district court re-acquired subject matter jurisdiction over this matter because (1) DSS initiated a new action by issuing a new summons and filing a termination petition, and (2) DSS had standing to file the petition due to the mother's relinquishment of custody of Arianna to DSS.

II. Grounds for termination of Respondent-father's parental rights

[3] Next, Respondent-father challenges the district court's determination that grounds existed to support the termination of his parental

rights. Specifically, he argues that DSS did not produce significant evidence at the termination hearing, independent of the void review orders discussed *supra*, to support its findings of fact and conclusions of law. We conclude that clear, cogent, and convincing evidence properly before the district court supported those findings of fact necessary to support the court's conclusion of law that at least one ground existed to terminate Respondent-father's parental rights to Arianna.

Pursuant to section 7B-1111(a), a district court may terminate parental rights upon a finding of one of eleven enumerated grounds. If we determine that the findings of fact support one ground for termination, we need not review the other challenged grounds. *Humphrey*, 156 N.C. App. at 540, 577 S.E.2d at 426. In making our determination, we consider "whether the [district] court's findings of fact were based on clear, cogent, and convincing evidence, and whether those findings of fact support a conclusion that parental termination should occur . . . ." *In re Oghenekevebe*, 123 N.C. App. 434, 435-36, 473 S.E.2d 393, 395 (1996) (citation omitted).

After reviewing the record, we conclude that the district court's findings of fact are sufficient to support the ground of failure to pay a reasonable portion of the cost of care for the juvenile. The pertinent statute provides:

> The juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent, for a continuous period of six months next preceding the filing of the petition or motion, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C. Gen. Stat. § 7B-1111(a)(3). "In determining what constitutes a 'reasonable portion' of the cost of care for a child, the parent's ability to pay is the controlling characteristic." *In re Clark*, 151 N.C. App. 286, 288, 565 S.E.2d 245, 247 (citation omitted), *disc. review denied*, 356 N.C. 302, 570 S.E.2d 501 (2002). "[N]onpayment constitutes a failure to pay a reasonable portion if and only if [the] respondent [is] able to pay some amount greater than zero." *Id.* at 289, 565 S.E.2d at 247 (citation and internal quotation marks omitted).

The district court made the following findings of fact to support this ground for termination:

32. In the past three (3) years, . . . Respondent[-f]ather has worked as a mechanic and truck driver.

33. Respondent[-f]ather has paid two (2) child support payments which total aggregate in [sic] Seven Hundred and Fifty Dollars and 00/100 ($750.00) during the three (3) years of the juvenile's life.

34. Child care costs for the juvenile are nearly Five Hundred Dollars 00/100 ($500.00) per month . . . .

35. Respondent[-f]ather has had a minimum of at least Six Hundred Dollars 00/100 ($600.00) a month of disposable income and failed to use the disposable income for the payment of a reasonable portion of cost for the juvenile.

36. Respondent[-f]ather is able to work and is gainfully employed during relevant time periods of this litigation, as well as time periods of the [underlying neglect and dependency proceeding].

37. Respondent[-f]ather for a continuous period of Six (6) months next [preceding] the filing of this Petition has willfully failed for such a period to pay a reasonable portion of the cost of care for the juvenile, although he is physically and financially able to do so.

Respondent-father has failed to specifically challenge any of these findings of fact as lacking evidentiary support. Consequently, they are presumed to be supported by competent evidence and are binding on appeal. *See In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009) (citations omitted). Based on these findings, the district court concluded that Arianna was placed in the custody of DSS and that Respondent-father, for a continuous period of six months next preceding the filing of the petition, willfully failed to pay a reasonable portion of the cost of care for Arianna despite being physically and financially able to do so.

[4] Respondent-father argues that the district court's conclusion is erroneous for a number of reasons. First, he argues that this ground requires the child to be placed in DSS custody, and that there is no legal order placing Arianna in DSS custody because the district court's review orders were rendered void due to the court's gap in jurisdiction.[5]

5. In a separate but related argument, Respondent-father contends that the district court erred by finding that DSS had custody of Arianna pursuant to the mother's

While we again agree that the district court did not have jurisdiction over this matter between the date of the dismissal order and the date of the termination petition, we disagree that DSS was divested of custody. Respondent-father's argument is misplaced. DSS was given custody of Arianna by virtue of the mother's relinquishment, which was authorized by N.C. Gen. Stat. § 48-3-701. The relinquishment specifically gave custody of Arianna to DSS—and this provision was required by statute. *See* N.C. Gen. Stat. § 48-3-703 (2013). The relinquishment procedures arising under Chapter 48 of our General Statutes provided an alternative avenue for DSS to lawfully obtain custody of Arianna and were not affected by the district court's gap in jurisdiction. Therefore, Arianna was in fact a "juvenile placed in the custody of a county department of social services . . . ." *See* N.C. Gen. Stat. § 7B-1111(a)(3).

Respondent-father does not appear to challenge the district court's finding that he failed to pay a reasonable portion of the cost of care for the juvenile despite being able to do so. Nonetheless, we hold that this finding is supported by the clear, cogent, and convincing evidence of record. First, Respondent-father's ability to pay was established by the child support enforcement orders. *See In re Becker*, 111 N.C. App. 85, 94, 431 S.E.2d 820, 826 (1993) (holding that since the respondent-father had "entered into a voluntary support agreement to pay $150.00 per month, DSS did not need to provide detailed evidence of his ability to pay support during the relevant time period"). The child support enforcement orders arose in a separate action derived from a separate statutory framework—Chapter 50 of our General Statutes. Additionally, the enforcement action had an entirely different file number (12 CVD 315) and was presided over by a different judge. Therefore, unlike the custody review orders, the child support enforcement orders were not rendered void by the district court's gap in jurisdiction.

In addition, the district court made findings establishing that Respondent-father failed to pay a reasonable amount of child support even though he had the ability to do so. Despite being subject to a child support order, Respondent-father made only two payments over the course of this case, and only one during the relevant time period. Moreover, Respondent-father signed a memorandum of understanding on two occasions acknowledging that he had the ability to pay. Lastly, we find it telling that Respondent-father made the two payments solely

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relinquishment. He contends that DSS can only gain temporary custody through nonsecure custody orders, and that those orders were "dissolved" when the original juvenile petition was dismissed. We have already rejected this argument *supra* and do not further address it here.

in connection with contempt proceedings against him—it appears that he never attempted to make regular monthly payments in the agreed-upon amount, and he remained in arrears after both payments. Thus, we conclude that the district court did not err in terminating Respondent-father's parental rights pursuant to section 7B-1111(a)(3), and we accordingly affirm the district court's orders.

III. Previous adjudication of Arianna as a dependent juvenile

[5] Finally, we address Respondent-father's argument that the district court erred by finding as fact that Arianna had previously been adjudicated dependent. In finding of fact number 42, the district court found that "[t]he juvenile has been found to be dependent as defined by [section] 7B-101(15)." Respondent-father argues that this finding is unsupported by the evidence because the original juvenile petition was dismissed.

We agree that this finding is error. It is undisputed that the district court dismissed the original juvenile petition and never conducted an adjudication of the petition. Consequently, the district court's finding that Arianna was adjudicated dependent is devoid of evidentiary support. However, this error is not prejudicial because the district court properly terminated Respondent-father's parental rights on another ground, which we have affirmed *supra*.

AFFIRMED.

Chief Judge McGEE and Judge TYSON concur.

IN RE C.R.B.

[245 N.C. App. 65 (2016)]

IN THE MATTER OF C.R.B, D.G.B., AND C.M.B.

No. COA15-644

Filed 19 January 2016

Termination of Parental Rights—DSS records—basis of testimony—hearsay—business records exception

The trial court did not abuse its discretion by determining that the termination of a mother's parental rights was in the best interests of the children where a portion of the evidence consisted of a social worker testifying from Department of Social Services reports regarding events that occurred before she was assigned to the case. The testimony was admissible under the business records exception to the hearsay rule.

Appeal by respondent-mother from orders entered 24 February 2015 by Judge Hal G. Harrison in Madison County District Court. Heard in the Court of Appeals 16 December 2015.

Leake & Stokes, by Larry Leake, for petitioner-appellee Madison County Department of Social Services.

Parker Poe Adams & Bernstein LLP, by Jason R. Benton, for Guardian ad Litem.

Michael E. Casterline, for respondent-appellant mother.

CALABRIA, Judge.

Respondent-mother ("Mother") appeals from the trial court's orders terminating her parental rights to the minor children C.B., D.B., and C.B. ("the children"). For the reasons that follow, we affirm.

I. Background

In January 2013, petitioner Madison County Department of Social Services ("DSS") conducted a "family assessment" of Mother and the children after six-year-old D.G.B. was discovered unattended in a car. During the assessment, "other concerns regarding the family became apparent." Specifically, Mother suffers from numerous debilitating mental illnesses as well as substance dependence and an "[e]xtremely [l]ow" intellectual capacity. The majority of Mother's infirmities stem from years of sexual and physical abuse that she suffered at the hands

of her father. Due to this myriad of mental and physical health issues, Mother was unable to provide proper care for the children.

Although the children's maternal grandmother had been assisting in their care, DSS expressed concern over her ability to appropriately supervise the children. Consequently, after DSS filed petitions alleging neglect and dependency, it obtained non-secure custody of the children in March 2013 and placed them in foster care. Shortly thereafter, Mother consented to the entry of an order that adjudicated the children to be neglected. Mother then signed a case plan formulated to address, *inter alia*, her mental health, substance abuse, and intellectual disability issues. As part of the plan toward Mother's reunification with the children, DSS worked "directly with [the] October Road-Assertive Community Treatment Team to insure that all [of Mother's] medical and mental needs [were] met." By attending all scheduled DSS meetings, completing a domestic violence education program, and undergoing a parenting capacity evaluation, Mother accomplished certain goals contained in her case plan. She also attended weekly supervised visits with the children. However, Mother failed to complete a substance abuse assessment. Mother's visitation was suspended in September 2013 upon recommendation of the children's therapist. At that time, Mother had not completed the October Road program, and in January 2014, the permanent plan was changed from reunification to adoption.

In March 2014, DSS filed petitions to terminate Mother's and the unknown father(s)' parental rights to the children. The petitions alleged that five statutory grounds existed to terminate Mother's parental rights. When the trial court conducted its termination hearing on 12 January 2015, Mother was in Georgia and claimed she was unable to secure transportation back to North Carolina. Her counsel moved the court for a continuance, but the motion was denied.

At the termination hearing, social worker Shanna Young ("Young") testified on behalf of DSS. Her testimony was based, in part, on the DSS report ("the report") filed with the trial court on 6 January 2015 in anticipation of the 12 January hearing. The report contained other DSS updates which had been addressed to and filed with the trial court at previous hearings on this matter. Mother repeatedly objected to Young's testimony from the case file as hearsay, but the trial court overruled each of those objections. The trial court also denied Mother's motion to strike the portions of Young's testimony regarding events and circumstances that occurred before August 2014, the time at which Young was assigned to work on the children's cases.

On 24 February 2015, the trial court entered adjudication and disposition orders terminating Mother's parental rights. The court concluded that two grounds existed to terminate Mother's parental rights: (1) her failure to make reasonable progress to correct the conditions that led to the children's removal from her care, and (2) her inability to provide the proper care or supervision for the children coupled with a reasonable probability that such inability would continue for the foreseeable future. *See* N.C. Gen. Stat. § 7B-1111(a)(2), (6) (2013). As a result, the court determined that terminating Mother's parental rights was in the children's best interests. Mother appeals from these orders.

II. Analysis

Trial courts conduct termination of parental rights proceedings in two distinct stages: adjudication and disposition. *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). At "the adjudication stage, the trial court must determine whether there exists one or more grounds for termination of parental rights under N.C. Gen. Stat. § 7B–1111(a)." *In re D.H.*, ___ N.C. App. ___, ___, 753 S.E.2d 732, 734 (2014); *see also* N.C. Gen. Stat. § 7B–1109(e) (2013). Our appellate review of the adjudication is limited to determining whether clear, cogent, and convincing evidence exists to support the court's findings of fact, and whether the findings of fact support the court's conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000). Even if there is evidence to the contrary, the trial court's findings are binding on appeal when "supported by ample, competent evidence[.]" *In re S.C.R.*, 198 N.C. App. 525, 531, 679 S.E.2d 905, 909 (2009). However, we review conclusions of law *de novo*. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006).

"If the trial court determines that at least one ground for termination exists, it then proceeds to the disposition stage where it must determine whether terminating the rights of the parent is in the best interest[s] of the child, in accordance with N.C. Gen.[]Stat. § 7B–1110(a)." *D.H.*, ___ N.C. App. at ___, 753 S.E.2d at 734. We review the trial court's determination of the child's best interests for an abuse of discretion, *In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002), which occurs only when "the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Pursuant to N.C. Gen. Stat. § 7B–1111(a)(2), a court may terminate parental rights when "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than [twelve] months without showing to the satisfaction of the court that reasonable progress

under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C. Gen. Stat. § 7–1111(a)(2).

> A finding of willfulness here does not require proof of parental fault. On the contrary, [w]illfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort. A finding of willfulness is not precluded even if the respondent has made some efforts to regain custody of [her child].

In re A.W., ___ N.C. App. ___, ___, 765 S.E.2d 111, 115 (2014) (internal quotation marks and citations omitted). "This standard operates as a safeguard for children. If parents were not required to show both positive efforts and positive results, 'a parent could forestall termination proceedings indefinitely by making sporadic efforts for that purpose.' " *In re B.S.D.S.*, 163 N.C. App. 540, 545, 594 S.E.2d 89, 93 (2004) (quoting *In re Nolen*, 117 N.C. App. 693, 700, 453 S.E.2d 220, 225 (1995)).

Mother first argues that the following two findings in the trial court's adjudication order are based on improperly admitted hearsay testimony:

> 19. [Mother] did have diagnostic testing, showing the IQ of 53, with very little ability to function. The record reflects that [Mother] had a parental capacity evaluation by Dr. Mary DeBeus, which reported that due to her low functioning level, additional testing could not be completed. During the twenty-two (22) months that the juveniles have been in the custody of [DSS], [Mother] has failed to complete her Court Ordered case plan, in large part due to [Mother's] mental health diagnoses of cyclical mood disorder involving psychotic features, post-traumatic stress disorder, poly-substance dependence, bipolar disorder, borderline personality disorder, and traumatic brain injury. Her mental health status has resulted in cycles of hospitalization, with stabilization of her symptoms after hospitalization, then digression upon her return home. [Mother] is unable to care for herself or her hygiene; is unable to provide adequate care for her children; and her symptoms are triggered by the stress of being around the juvenile and his siblings.
>
> . . .
>
> 21. There was no documentation of a substance abuse assessment, and at the time of [DSS] being relieved of its

> efforts in the fall of 2013, . . . Mother had not completed the October Road Program.

Specifically, Mother contends the trial court erred by admitting the portions of Young's testimony in which she relied on information contained in DSS's report.

In Mother's view, because Young read from the report and testified "to circumstances and events about which she had no first-hand knowledge," a significant amount of her testimony constituted inadmissible hearsay and provided the evidentiary support for findings of fact 19 and 21. According to Mother, since these findings were "critical" to the trial court's conclusion that her parental rights should be terminated based, in part, on her failure "to show progress in alleviating the causes of the children's removal" pursuant to subdivision 7B–1111(a)(2), there would have been "insufficient competent evidence to support th[is] ground[] for termination" if the court had properly sustained Mother's hearsay objections to Young's testimony. We disagree.

Generally, a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." N.C. Gen. Stat. § 8C–1, Rule 602 (2013). Furthermore, " '[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C–1, Rule 801(c) (2013). Unless allowed by statute or the Rules of Evidence, hearsay evidence is not admissible in court. N.C. Gen. Stat. § 8C–1, Rule 802 (2013). This Court has previously determined that even though a witness's knowledge was "limited to the contents of [the] plaintiff's file with which he had familiarized himself, he could properly testify about the records and their significance so long as the records themselves were admissible under the business records exception to the hearsay rule[.]" *U.S. Leasing Corp. v. Everett, Creech, Hancock and Herzig*, 88 N.C. App. 418, 423, 363 S.E.2d 665, 667 (1988).

Pursuant to the business records exception, the following items of evidence are not excluded by the hearsay rule, even though the declarant is unavailable as a witness:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make

> the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

N.C. Gen. Stat. § 8C–1, Rule 803(6) (2013). Qualifying business records are admissible under Rule 803(6) "when a proper foundation . . . is laid by testimony of a witness who is familiar with the . . . records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy." *In re S.D.J.*, 192 N.C. App. 478, 482, 665 S.E.2d 818, 821 (2008) (citations and internal quotation marks omitted).

In the instant case, Mother is wrong to suggest that Young was not qualified to introduce and testify to the report, which was comprised of the DSS business records in question. "While the foundation must be laid by a person familiar with the records and the system under which they are made, there is 'no requirement that the records be authenticated by the person who made them.' " *Id.* at 482–83, 665 S.E.2d at 821 (citation omitted); *see also Barber v. Babcock & Wilcox Constr. Co.*, 98 N.C. App. 203, 208, 390 S.E.2d 341, 344 (1990) (under Rule 803(6), safety specialist for defendant-employer was qualified to authenticate and introduce the results of a test performed by a private laboratory because "he was familiar with the system used by his company in obtaining tests and filing the results with his office"), *reversed on other grounds on reh'g*, 101 N.C. App. 564, 400 S.E.2d 735 (1991). Not only was Young familiar with the report, she personally signed it and appears to be one of its authors.

Furthermore, although the report was never offered into evidence at the termination hearing, the majority of its contents—previous DSS updates addressed to the trial court—had been admitted at prior hearings, and the report as a whole would have been admissible under the business records exception to the hearsay rule. Specifically, Young testified that she had reviewed and was familiar with DSS's case file on this matter, that she had kept and maintained the file since her employment with DSS, and that the file's contents were maintained during the "regular, ordinary course of [DSS's] business." Given this foundation, Young's testimony regarding matters contained in DSS's business records—namely, the circumstances and events underlying the petition to terminate Mother's parental rights—was clearly admissible under the rule announced in *U.S. Leasing Corp.* It is equally clear that Young's testimony amply supported the challenged findings.

III. Conclusion

In sum, we conclude that findings 19 and 21 were fully supported by Young's testimony, which was admissible under the business records exception to the hearsay rule. These findings, which are based on clear, cogent, and convincing evidence, support the trial court's conclusion that a sufficient ground pursuant to subdivision 7B-1111(a)(2) existed to terminate Mother's parental rights to the children based on her willfulness in leaving the children in foster care for at least twelve months and her failure to make reasonable progress in correcting the conditions that led to the their removal from her care. Finding 21 specifically demonstrates that Mother failed to complete vital portions of her case plan while the children were in foster care. Accordingly, the trial court did not abuse its discretion by determining that the termination of Mother's parental rights was in the best interests of the children. Since "[a] valid finding on one statutorily enumerated ground is sufficient to support an order terminating parental rights[,]" we need not address Mother's remaining arguments challenging the other ground for termination found by the trial court. *In re Greene*, 152 N.C. App. 410, 416, 568 S.E.2d 634, 638 (2002) (citations omitted; second alteration added).

AFFIRMED.

Judges ELMORE and ZACHARY concur.

IN THE MATTER OF Q.A., J.A., M.A., S.G., T.G.

No. COA15-933

Filed 19 January 2016

Child Abuse, Dependency, and Neglect—five children—same stipulated facts for all children—different adjudications for two children

Where the parties stipulated that five siblings experienced the same living conditions and other pertinent facts, the trial court erred by adjudicating the two girls but not the three boys as neglected juveniles and dismissing Youth and Family Services' petition regarding the boys. The parties stipulated that all five children were in the care of their grandmother, with no home, no electricity, no plumbing, and no food. While relevant to an adjudication of dependency,

the availability of the boys' father had no bearing on an adjudication of neglect. On these facts, the trial court could not have found that some of the children were neglected while others were not.

Appeal by respondent-mother from order entered 13 May 2015 by Judge Rickye McKoy-Mitchell in Mecklenburg County District Court. Heard in the Court of Appeals 16 December 2015.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Joyce L. Terres, for respondent-appellant mother.

Kathleen A. Jackson for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services.

Melanie Stewart Cranford for guardian ad litem.

ELMORE, Judge.

The trial court erred in (1) adjudicating the two girls, but not the three boys, neglected juveniles, despite the parties' stipulations to the same facts regarding the living conditions and other pertinent characteristics experienced by all five children, and (2) subsequently dismissing the petition regarding the boys.

I. Background

In October 2014, the Mecklenburg County Department of Social Services Youth and Family Services Division (YFS) received a report regarding juveniles Quinn, Mark, John, Sophia, and Tori.[1] Their mother (respondent) had gone to New York two weeks prior, leaving them in the care of their grandmother. The grandmother, however, was unable to adequately care for the children. In November 2014, she moved from a hotel into a transitional home. By 10 December 2014, the home was without heat, had no working plumbing in the bathrooms, and no hot water. They lost electricity two days later. On 13 December 2014, they were evicted from the transitional home.

On 15 December 2014, YFS filed a petition alleging the children to be neglected and dependent. The petition listed three parents for the juveniles: C.B., father of Sophia and Tori, M.A., Sr., father of Quinn, John, and Mark, and respondent, mother of all five children. The petition contained

1. We use these pseudonyms to protect the identity of the minor children.

no known address for respondent or M.A., Sr.; C.B. was incarcerated in Virginia.

On 1 April 2015, the trial court held a nonsecure custody hearing for the benefit of M.A., Sr., followed by adjudication and disposition hearings. M.A., Sr. was present, C.B. appeared via telephone, and respondent was absent. During the nonsecure custody hearing, the trial court denied M.A., Sr.'s request for a dismissal of the nonsecure custody order so that Quinn, John, and Mark could be temporarily placed with him.

During the adjudication hearing, the petition was read into the record. Attorneys for respondent and C.B. had stipulated to the submission of the verified petition for purposes of adjudication. M.A., Sr.'s attorney stipulated to those portions of the petition addressing the children's circumstances prior to the filing of the petition, but denied those portions addressing YFS's unsuccessful efforts to locate him, his unknown whereabouts, and having no relatives capable of providing for the children. M.A., Sr. also testified at the hearing, responding affirmatively to questions from his attorney that YFS had been in contact with him a number of times over the years and that he gave them his address "years ago."

At the close of the evidence, the trial court adjudicated Tori and Sophia neglected and dependent juveniles, but did not enter an adjudication as to Quinn, John, or Mark. In its written order, the trial court concluded that Tori and Sophia were neglected and dependent and that it was in their best interest to "remain in the legal custody of YFS . . . with/in appropriate placement." The court further concluded that it was in the best interest of Quinn, John, and Mark "to be returned to father, [M.A., Sr.], where he/she will receive proper care and supervision . . . ." The court then ordered the petition for Quinn, John, and Mark be dismissed, and that they "be returned to [M.A., Sr]."

Respondent appeals from the trial court's adjudication and disposition order entered 13 May 2015.

II. Discussion

Respondent argues that the trial court erred in adjudicating Tori and Sophia neglected, but not Quinn, John, and Mark, because the pertinent circumstances surrounding all five children were the same. We agree.

"The role of this Court in reviewing a trial court's adjudication of neglect and abuse is to determine '(1) whether the findings of fact are supported by "clear and convincing evidence," and (2) whether the legal

conclusions are supported by the findings of fact[.]' " *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (quoting *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000)), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008). "If such evidence exists, the findings of the trial court are binding on appeal, even if the evidence would support a finding to the contrary." *Id.*

The Juvenile Code defines a "neglected juvenile" as one

> who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2013). "In determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent." *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984).

The trial court, in considering the stipulated facts in the petition, had evidence that the children lived in an injurious environment. When DSS took nonsecure custody of the children, all five were in the care of their grandmother, having no home, no electricity, no plumbing, and no food. Neglect, the determination based upon the factors surrounding a child, was the same for all five children. The trial court did find that the boys' father was "willing to take placement of his children and would have been a resource if contact was made with him prior to the children coming into custody." Regardless of whether the evidence supports this finding, however, the availability of the boys' father in this case, while relevant to an adjudication of dependency, has no bearing on an adjudication of neglect. On these facts, the trial court could not have found that some of the children were neglected while others were not. Accordingly, we reverse and remand this matter to the trial court to enter a proper adjudication order, to wit, an order adjudicating the three boys, as well as the girls, neglected juveniles.

In addition, because the district court's erroneous adjudication directly resulted in the court's dismissal of the petition regarding the boys, we vacate that portion of the order. A dispositional hearing must follow the adjudication of a juvenile as abused, neglected, or dependent. *See* N.C. Gen. Stat. § 7B-901(a) (2013) ("The dispositional hearing shall take place immediately following the adjudicatory hearing . . . ."). Thus,

on remand the district court retains jurisdiction both to properly adjudicate the boys as neglected juveniles and to enter an appropriate disposition order for the three boys.

III. Conclusion

In conclusion, we remand to the district court for (1) a proper adjudication of the boys and (2) entry of an appropriate disposition regarding the boys based thereupon.

REVERSED IN PART; VACATED IN PART; AND REMANDED.

Judges GEER and STEPHENS concur.

IN THE MATTER OF C.L.S.

No. COA15-613

Filed 19 January 2016

Termination of Parental Rights—identity of father discovered—unwillingness to pursue reunification

In its order terminating respondent-father's parental rights to his minor child, the trial court did not err by concluding that the child was neglected by respondent at the time of the termination hearing. The identity of the child's father was unknown until paternity tests were performed after the child was adjudicated neglected and dependent. At the termination hearing, a social worker testified that respondent had never met the child, had never provided any support for the child, and had been unwilling to pursue a plan of reunification. Respondent's failure "to provide love, support, affection, and personal contact" to the child supported the trial court's conclusion that respondent's parental rights should be terminated.

Judge TYSON dissenting.

Appeal by Respondent–Father from order entered 4 March 2015 by Judge J.H. Corpening, II in District Court, New Hanover County. Heard in the Court of Appeals 29 December 2015.

David A. Perez for Respondent–Appellant Father.

Jennifer G. Cooke for New Hanover County Department of Social Services, Petitioner–Appellee.

Ellis & Winters LLP, by Steven A. Scoggan, for Guardian ad Litem.

McGEE, Chief Judge.

Respondent–Father ("Respondent") appeals from an order terminating his parental rights[1] as to his minor child, C.L.S. We affirm the trial court's order.

New Hanover County Department of Social Services ("DSS") filed a petition on 20 September 2013, alleging that C.L.S. was a neglected and dependent juvenile. DSS alleged that C.L.S. tested positive for cocaine and PCP at birth, and that C.L.S.'s mother tested positive for cocaine. The mother further admitted to using cocaine and marijuana while pregnant with C.L.S. DSS alleged that C.L.S.'s mother "ha[d] a long history with [DSS] dating back many years," noting that she had relinquished her parental rights to another child who also tested positive for cocaine at birth. DSS also alleged that the mother had "a long history of substance abuse, and mental health issues and a drug-related criminal history," and was unemployed and living with her mother, who "also ha[d] a long history of involvement with DSS and would not [be] recommended for placement" of C.L.S. DSS further alleged that the mother reported that C.L.S. was "the product of a one night stand and the father [wa]s unknown."

The trial court adjudicated C.L.S. neglected and dependent on 15 November 2013 based upon the mother's stipulations to the allegations in DSS's petition. At the time of the adjudication, the identity of C.L.S.'s father was still unknown. Paternity tests in May 2014 determined Respondent was the father of C.L.S. The trial court ceased reunification efforts and changed the permanent plan for C.L.S. to adoption on 29 September 2014.

DSS filed a petition to terminate parental rights as to C.L.S. on 14 October 2014 on the grounds that both the mother and Respondent neglected C.L.S., had willfully abandoned C.L.S. for more than twelve months without showing reasonable progress in correcting the

1. The parental rights of the mother of C.L.S. were also terminated by the 4 March 2015 order, but the mother does not appeal from this order.

conditions of neglect which led to his removal, and that Respondent had failed to take steps to legitimize C.L.S. In its petition, DSS alleged that Respondent failed to enter into a Family Services Agreement when requested on 7 April 2014 indicating that "he did not wish to pursue a plan of reunification." Although Respondent then "indicated his willingness" to enter into a case plan on 26 June 2014, Respondent "declined to sign his case plan which included requests to submit to a Comprehensive Clinical Assessment and follow any recommendations, submit to random drug screens, complete a parenting assessment and comply with any recommendations, and obtain and maintain stable housing and employment." Respondent was also incarcerated in May 2014 on pending charges said to have included attempted first- or second-degree rape, second-degree kidnapping, breaking or entering, misdemeanor larceny, false fire alarm, resisting, delaying, or obstructing public officers, and for being a habitual felon. The trial court terminated both the mother's and Respondent's parental rights as to C.L.S. on 4 March 2015. Respondent appeals.

Respondent first contends the trial court erred by concluding that there was clear, cogent, and convincing evidence to support the trial court's conclusion that C.L.S. was neglected by Respondent at the time of the hearing, and thus asserts that there was no evidence to terminate his parental rights on this statutory ground. We disagree.

N.C. Gen. Stat. § 7B 1111 sets out the statutory grounds for terminating parental rights. N.C. Gen. Stat. § 7B 1111 (2013). A finding of any one of the separately enumerated grounds is sufficient to support termination. *See In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233–34 (1990). "The standard of appellate review is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law." *In re D.J.D.*, *D.M.D.*, *S.J.D.*, *J.M.D.*, 171 N.C. App. 230, 238, 615 S.E.2d 26, 3 2 (2005).

In the present case, the trial court first concluded that grounds existed to terminate Respondent's parental rights to C.L.S. based upon neglect in accordance with N.C. Gen. Stat. § 7B 1111(a)(1). A "neglected" juvenile is defined in N.C. Gen. Stat. § 7B 101(15) as

> [a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an

> environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B 101(15) (2013). Thus, "[n]eglect is more than a parent's failure to provide physical necessities and can include the total failure to provide love, support, affection, and personal contact." *In re D.J.D.*, 171 N.C. App. at 240, 615 S.E.2d at 33 (internal quotation marks omitted).

Additionally, "[i]ncarceration alone . . . does not negate a father's neglect of his child," *Whittington v. Hendren*, 156 N.C. App. 364, 368, 576 S.E.2d 372, 376 (2003), because "[t]he sacrifices which parenthood often requires are not forfeited when the parent is in custody." *Id.* Thus, while incarceration may limit a parent's ability "to show affection, it is not an excuse for [a parent's] failure to show interest in [a child's] welfare by whatever means available, [because a] father's neglect of his child cannot be negated by incarceration alone." *In re D.J.D.*, 171 N.C. App. at 240, 615 S.E.2d at 33 (citation and internal quotation marks omitted).

Further, "[a]s always, the best interests of the children and parental fitness *at the time of the termination hearing* are the determinative factors." *Id.* at 239–40, 615 S.E.2d at 33 (emphasis added). Where "a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, the trial court must employ a different kind of analysis to determine whether the evidence supports a finding of neglect," *In re Pierce*, 146 N.C. App. 641, 651, 554 S.E.2d 25, 31 (2001), *aff'd*, 356 N.C. 68, 565 S.E.2d 81 (2002), "because requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible." *Id.*

In the present case, evidence was presented by the DSS social worker that, when Respondent's paternity of C.L.S. was confirmed, Respondent "stated that he didn't want to pursue a plan of reunification" with C.L.S. The DSS social worker also testified that, before Respondent was incarcerated, she "attempted to engage [Respondent] a couple of times by asking him to come in and meet with [her] and enter into a visitation plan, and he called to reschedule a couple of times, [and then] he no-showed a couple of times to those appointments." Although the DSS social worker testified that, after Respondent was incarcerated, he "did say that he wanted to enter into a case plan," when she "brought the case plan with [her] to visit him in jail, . . . he declined to sign [it], saying that he wanted the input of his attorney before signing it," and when she asked Respondent about it several times after that, she "never received it back from him." The DSS social worker further testified that Respondent

never provided any financial support for C.L.S., never met C.L.S., and, although he "discussed visitation briefly" with DSS before the paternity results were completed, Respondent "was never able to come back to [DSS] for any of [the] scheduled meetings." Thus, the record before us reflects that, at the time of the termination hearing, Respondent had failed "to provide love, support, affection, and personal contact" to C.L.S. *See In re D.J.D.*, 171 N.C. App. at 240, 615 S.E.2d at 33. Because this evidence supported the trial court's findings that Respondent "indicated an unwillingness to enter a Family Services Agreement," "ha[d] never met [C.L.S.]," and "ha[d] no bond with" C.L.S., we conclude that there was evidence to support the trial court's conclusion that the juvenile was neglected by Respondent and, thus, that there was evidence to terminate his parental rights on this statutory ground. Since we have "determine[d] there is at least one ground to support [the] conclusion that [Respondent's] parental rights should be terminated, it is unnecessary to address the remaining grounds" challenged in Respondent's brief. *See In re P.L.P.*, 173 N.C. App. 1, 8, 618 S.E.2d 241, 246 (2005) *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006).

AFFIRMED.

Judge STEPHENS concurs.

Judge TYSON dissents with a separate opinion.

TYSON, Judge, dissenting.

The majority's opinion finds clear, cogent, and convincing evidence supports the trial court's conclusion that the juvenile was neglected by Respondent and affirms the trial court's order to terminate his parental rights on the statutory ground of neglect. I disagree and respectfully dissent.

The majority's opinion "parades the horribles" of the actions of the mother, which formed the basis of DSS's petition to terminate the mother's parental rights. She is not a party to this appeal.

There is no indication in September 2013, when the initial petition alleging neglect by the mother was filed, that Respondent even knew he was the parent of a child. The trial court's review order, filed in February 2014, shows the juvenile's mother indicated Respondent *may* be the father of C.L.S. Subsequently, Respondent complied with a DNA paternity test in May 2014. DSS filed its petition to terminate

Respondent-father's parental rights in October 2014, only five months after Respondent learned he was C.L.S.'s father.

Nothing in the record shows Respondent was ever joined to the underlying action adjudicating C.L.S. neglected and dependent. The adjudication of C.L.S. was entered on 15 November 2013, months before Respondent knew he was the parent of a child. All of the statutorily required actions taken by DSS towards the initial goal of reunification with the child were aimed solely at the mother, not at Respondent.

The transcript shows Respondent was incarcerated one month after the DNA test revealed his paternity. At the time of the Termination of Parental Rights hearing, Respondent had not been tried for the offenses for which he was incarcerated awaiting trial.

Neglect

The majority finds there was clear, cogent and convincing evidence to support the trial court's conclusion that C.L.S. was neglected by Respondent and grounds existed for termination of Respondent's parental rights. I disagree.

"[I]n deciding whether a child is neglected for purposes of terminating parental rights, the dispositive question is the fitness of the parent to care for the child 'at the time of the termination proceeding.' " *In re L.O.K.*, 174 N.C. App. 426, 435, 621 S.E.2d 236, 242 (2005) (quoting *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984)). When, however, as here, "a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible." *Id.* (internal quotation marks and citation omitted). "In those circumstances, a trial court may find that grounds for termination exist upon a showing of a history of neglect by the parent and the probability of a repetition of neglect." *Id.* (citation and internal quotation marks omitted).

In this case, while there was a prior adjudication of neglect, the sole party responsible for the neglect was clearly the juvenile's mother, not Respondent. Respondent never had custody of the juvenile, and his paternity of the juvenile was unknown until well after the adjudication of neglect. No evidence can support a finding that Respondent had previously neglected C.L.S. Without *any* evidence, much less the absence of clear, cogent and convincing evidence of prior neglect, Petitioner utterly failed to show neglect at the time of the hearing. *In re J.G.B.*, 177 N.C. App. 375, 382, 628 S.E.2d 450, 455 (2006).

The majority's opinion states "while incarceration may limit a parent's ability to show affection, it is not an excuse for [a parent's] failure to show interest in a child's welfare by whatever means available, [because a] father's neglect of his child cannot be negated by incarceration alone." (citing *In re D.J.D.*, *D.M.D.*, *S.J.D.*, *J.M.D.*, 171 N.C. App. 230, 240, 615 S.E.2d 26, 33 (2005)). This assertion is wholly inapplicable and fallacious here, where the father was incarcerated one month after learning he was a father. He was not provided any real opportunity to show interest in his child.

I do not find the testimony of the Petitioner DSS's social worker that after Respondent was incarcerated he indicated he wished to enter a case plan, wanted his attorney's review and input before he signed, and that she never received it to be clear, cogent or convincing evidence to support a failure "to provide love, support, affection, and personal contact" to C.L.S. *In re D.J.D.*, 171 N.C. App at 240, 615 S.E.2d at 33.

The trial court erred in concluding grounds existed under N.C. Gen. Stat. § 7B-1111(a)(1) to terminate Respondent's parental rights.

After concluding termination based upon neglect was proper, the majority's opinion does not address the remainder of Respondent's arguments. Since termination based upon neglect was without any foundation, I address Respondent's remaining arguments.

Failure to Make Reasonable Progress

Respondent argues the trial court erred by concluding C.L.S. had been "willfully left" in foster care or placement outside the home for more than twelve months as set forth in N.C. Gen. Stat. § 7B-1111(a)(2).

A trial court may terminate parental rights upon a finding that the parent, "willfully left the juvenile in foster care . . . for more than 12 months without showing . . . reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C. Gen. Stat. § 7B-1111(a)(2) (2013). For the trial court to terminate for failure to make reasonable progress, DSS must show that the parent had the ability to make progress but was "unwilling to make the effort." *In re O.C. and O.B.*, 171 N.C. App. 457, 465, 615 S.E.2d 391, 396 (2005) (citation omitted).

Here Respondent's paternity of the juvenile was unknown both when DSS initially filed its petition and when the juvenile was adjudicated neglected and dependent. No evidence in the record shows Respondent was aware of his possible paternity of the juvenile prior

to these dates until May 2015. The petition to terminate Respondent's parental rights was filed 14 October 2014, five months later, less than the statutorily required twelve months. As a consequence, and without any clear, cogent and convincing evidence, the trial court erred by concluding C.L.S. had been "willfully left" in foster care or placement outside the home for more than twelve months as set forth in N.C. Gen. Stat. § 7B–1111(a)(2).

Failure to Legitimate

The trial court also erred in its conclusion that Respondent failed to establish paternity or legitimate the child by any of the statutorily mandated methods. This conclusion is unsupported by any finding of fact and supported by no clear, cogent or convincing evidence.

In its termination order, the trial court included a conclusory statement in its FINDINGS OF FACT that DSS during the pretrial hearing had identified as a ground for termination of parental rights "that Respondent-Father has failed to take steps to legitimize the minor child." The trial court makes no further findings regarding Respondent and any failure to establish paternity or legitimate C.L.S. through any of the means enumerated in N.C. Gen. Stat. § 7B-1111(a)(5).

N.C. Gen. Stat. § 7B-1111(a)(5) authorizes termination where the father has not prior to the petition:

> a. Filed an affidavit of paternity in a central registry maintained by the Department of Health and Human Services; provided, the petitioner or movant shall inquire of the Department of Health and Human Services as to whether such an affidavit has been so filed and the Department's certified reply shall be submitted to and considered by the court. [or]
>
> b. Legitimated the juvenile pursuant to provisions of G.S. 49-10, G.S. 49-12.1, or filed a petition for this specific purpose. [or]
>
> c. Legitimated the juvenile by marriage to the mother of the juvenile. [or]
>
> d. Provided substantial financial support or consistent care with respect to the juvenile and mother. [or]
>
> e Established paternity through G.S. 49-14, 110-132, 130A-101, 130A-118, or other judicial proceeding.

N.C. Gen. Stat. § 7B-1111(a)(5) (2013).

The trial court *must* make specific findings of fact as to each subsection of N.C. Gen. Stat. § 7B-1111(a)(5). *In re I.S.*, 170 N.C. App. 78, 88, 611 S.E.2d 467, 473 (2005) (emphasis supplied) (citing *In re Harris*, 87 N.C. App. 179, 188, 360 S.E.2d 485, 490 (1987)). The trial court's conclusion that the ground for termination pursuant N.C. Gen. Stat. § 7B-1111(a)(5) exists is not supported by the requisite findings based upon clear, cogent and convincing evidence. The trial court's conclusion that grounds existed to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(5) is erroneous, and must be reversed.

For all of these reasons, the majority's opinion is wholly opposite to the statutes and controlling case law. The trial court's conclusion that statutory grounds exist to terminate the parental rights of Respondent-father is not supported by clear, cogent and convincing evidence. The trial court's order is affected by reversible error and should be reversed. I respectfully dissent.

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY RANDALL HERNDON AND NONA R. HERNDON AKA NONA RENEE HERNDON DATED AUGUST 3, 2001 AND RECORDED IN BOOK 1403 AT PAGE 773 IN THE SAMPSON COUNTY PUBLIC REGISTRY, NORTH CAROLINA

No. COA15-488

Filed 19 January 2016

1. Evidence—not offered for admission—cumulative and unnecessary

On appeal from the superior court's order dismissing a foreclosure proceeding, the Court of Appeals rejected the substitute trustee's argument that the superior court erred by excluding an affidavit from evidence. The substitute trustee acknowledged on appeal that neither party expressly sought to admit the affidavit. Even assuming the affidavit was offered for admission, the trial court did not abuse its discretion, as the proponent of the affidavit described it as cumulative and unnecessary.

2. Mortgages and Deeds of Trust—foreclosure by sale—two-dismissal rule

Where two previous actions for foreclosure by sale were voluntarily dismissed and a third action for foreclosure by sale was subsequently filed, the superior court erred by dismissing the third

action pursuant to Rule of Civil Procedure 41(a). Each foreclosure petition covered defaults from different time periods—the first covered defaults from November 2007 to November 2009, the second covered those and additional defaults from December 2009 to December 2011, and the third covered those and additional defaults from January 2012 to February 2014. The claims of default and particular facts at issue in each action therefore differed and Rule 41(a)'s two-dismissal rule did not apply. The lender's election to accelerate payment did not bar the subsequent foreclosure actions.

Appeal by Petitioner from order entered 30 December 2014 by Judge Gale M. Adams in Sampson County Superior Court. Heard in the Court of Appeals 21 October 2015.

Shapiro & Ingle, LLP, by Jason K. Purser, for Petitioner.

Brent Adams & Associates, by Brenton D. Adams, for Respondents.

STEPHENS, Judge.

Factual and Procedural Background

On 3 August 2001, Respondent Randall Herndon ("Herndon") executed a promissory note in favor of Long Beach Mortgage Company ("Long Beach") in consideration for a $60,800 loan. The loan was payable over 30 years at a rate of 11.25% interest. Herndon and his wife, Respondent Nona R. Herndon, executed a deed of trust to secure the debt with real property located at 1375 Union Church Road in Dunn ("the home"). Herndon defaulted on the debt beginning with his failure to make a payment due 1 November 2007 and never again made a payment on the loan.

After the note was executed, Long Beach endorsed it such that it was payable to "blank." By November 2009, Petitioner U.S. Bank National Association ("the bank") was in possession of the note and was trustee of the deed of trust. On 4 November 2009, the substitute trustee, on behalf of the bank, filed in the Superior Court in Sampson County a notice of hearing in support of its foreclosure petition in file number 09 SP 246 ("the first foreclosure petition"). The notice of hearing stated that the petition would be heard on 7 June 2010, noted that the debt had been accelerated, and generally described a payment default. The substitute trustee obtained continuances for the hearing several times, with the last hearing date set for 25 August 2011. However, on 19 August 2011,

the substitute trustee took a voluntary dismissal of the special proceeding pursuant to Rule of Civil Procedure 41(a).

On 8 December 2011, the substitute trustee filed a notice of hearing in support of a foreclosure petition in file number 11 SP 248 ("the second foreclosure petition"). The notice set the hearing in the second foreclosure proceeding for 9 February 2012, noted that the debt had been accelerated, and generally described a payment default. Following a series of continuances, the second petition came on for hearing on 4 October 2012. At the hearing, evidence was presented, including an acceleration warning letter dated 21 October 2011. At the conclusion of the hearing, the clerk entered an order permitting foreclosure, which the Herndons appealed to the superior court the following day. However, before the appeal was heard, the substitute trustee again took a voluntary dismissal of the special proceeding pursuant to Rule 41(a).

On 21 February 2014, the substitute trustee filed a notice of hearing in support of a foreclosure petition in file number 14 SP 36 ("the third foreclosure petition"). The notice set the hearing in the third foreclosure proceeding for 27 March 2014 and noted that the debt had been accelerated. The hearing was continued several times. At the hearing on 21 August 2014, evidence was presented to the clerk, who entered an order permitting foreclosure on the same day. The Herndons appealed that order to the Sampson County Superior Court on 2 September 2014. Following a hearing in November 2014, the Honorable Gale M. Adams, Judge presiding, entered an order on 30 December 2014 reversing the clerk's order and dismissing the proceeding ("the dismissal order"). The dismissal order provided:

> It appearing to the [c]ourt that the Petitioner, U.S. Bank National Association, as Trustee, Successor in Interest to Wachovia Bank, National Association, (formerly known as First Union National Bank) as Trustee, for Long Beach Mortgage Loan Trust 2001-4, brought two previous special proceedings; 09 SP 246 and 11 SP 248. The only document of substance in file 09 SP 246 is a Notice of Hearing which contains no date or other information regarding default. Both 09 SP 246 and 11 SP 248 were voluntarily dismissed.
>
> On the basis of the record, evidence presented, and arguments of counsel, the [c]ourt is of the opinion the dismissal in 11 SP 248 acted as an adjudication on the merits pursuant to Rule 41(a)(1) of the North Carolina Rules of Civil Procedure.

On 27 January 2015, the substitute trustee gave notice of appeal from the dismissal order.

Discussion

On appeal, the substitute trustee argues that the superior court erred in (1) excluding an affidavit from Dana Crawford and (2) dismissing the third foreclosure petition under the "two dismissal rule" of Rule 41(a). As discussed below, we reverse the dismissal order.

I. The Crawford affidavit

[1] The substitute trustee first argues that the superior court erred in excluding an affidavit from Dana Crawford, a document control officer employed by the authorized servicer handling Herndon's loan for the bank. However, on appeal, the substitute trustee acknowledges that "neither party expressly sought to admit [the Crawford affidavit]" at the hearing before the superior court, "although [the substitute trustee's] counsel did refer to it." After reviewing the transcript of the 3 November 2014 proceeding in the superior court, we agree that the Crawford affidavit was never offered for admission.

Toward the end of the motion hearing, the Crawford affidavit was discussed by Robert Hood, counsel for the substitute trustee:

> THE COURT: Mr. Hood, can I see the affidavit that you have for the third [foreclosure petition]?
>
> MR. HOOD: Yes, your Honor. I have two new affidavits. They are identical. May I approach? This would be in addition to the affidavit that's in the special proceeding file already.
>
> THE COURT: Mr. Hood, I've gone through this entire file. I see this affidavit in the file, but it's not the one you've handed up. It's different.
>
> MR. HOOD: Yes.
>
> THE COURT: Y'all want to—go ahead.
>
> MR. HOOD: I was just going to ask, is that the affidavit in the file of August 21st? I think that was clocked in on August 21st, 2014?
>
> THE COURT: Let me go back to that.
>
> MR. HOOD: Yes, your Honor. The second—the two

affidavits that I tendered today are—they have more information and they were executed specifically for this proceeding today. I have another copy. I have the first one.

THE COURT: So when you say that the affidavit that you handed up is in the file, this affidavit that you handed up is not actually in the file. It's a different affidavit.

MR. HOOD: No. No. A different affidavit. I'm sorry. I may have misspoke, your Honor. There was an affidavit at the original hearing that is in the file and that's the one that was clocked in on August 21st.

THE COURT: Yes.

MR. HOOD: The two affidavits that I handed up today, they are not in the file. Those were specifically for today's proceeding.

THE COURT: What's the purpose of that?

MR. HOOD: *The purpose of the two affidavits, your Honor, were just to bolster the, again, the notion of the elements of default on behalf of the respondent[s]. Personally, they are superfluous because the original affidavit that was clocked in at the hearing was sufficient.* The clerk said it was sufficient. That's why she entered the order. But, again, our client wanted to be crystal clear as to the nature of the default. A little bit of the history is there on the second page. They are identical, executed only three days apart from each other.

It is not uncommon for our client to introduce another affidavit of default, especially when we are submitting both the original note and Deed of Trust.

(Emphasis added). There followed a brief discussion with the Herndons' counsel during which the affidavits were not mentioned, and the substitute trustee's counsel expressed concern about the original note and deed of trust which the trial court had been reviewing. Judge Adams responded, "A copy of the note is in the file. Let me hand back these affidavits also. The note is in the file." That remark ends the hearing transcript, and nothing in the transcript suggests that the substitute trustee's counsel ever asked that the affidavits be admitted or clarified for the court that he did not want the affidavits to be returned along with the original note and deed of trust.

Further, even assuming *arguendo* that the affidavits were offered for admission and that the trial court excluded them, as the substitute trustee notes,

> [w]e review a trial court's decision to exclude evidence under Rule 403 for abuse of discretion. An abuse of discretion results when the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision. In our review, we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record.

State v. Whaley, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008) (citations and internal quotation marks omitted). Exclusion of evidence is proper "under Rule 403 if the trial court determines its 'probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or *needless presentation of cumulative evidence*.' " *Id.* at 159-60, 655 S.E.2d at 390 (quoting N.C. Gen. Stat. § 8C-1, Rule 403) (emphasis added). The substitute trustee's counsel stated that the affidavits were being offered "just to bolster the, again, the notion of the elements of default" and characterized them as "superfluous" given that other evidence in the file "was sufficient." Considering that the proponent of the evidence explicitly described the affidavits as unnecessary and cumulative, we would reject the argument that the trial court's decision not to admit them was "unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision." *See id.* at 160, 655 S.E.2d at 390 (citation and internal quotation marks omitted). Accordingly, even if we were to hold that the affidavits had been offered into evidence, we would conclude that the trial court did not abuse its discretion in declining to admit them. This argument is overruled.

II. The two dismissal rule

[2] The substitute trustee next argues that the superior court erred in dismissing the third foreclosure petition under the two dismissal rule of Rule 41(a). We agree.

We begin by addressing the substitute trustee's assertion that the loan was not accelerated until 21 August 2011, the date of the only acceleration warning letter included in the record before us. The substitute trustee contends that the first foreclosure petition was filed before the loan was accelerated and was thus based upon Herndon's default on the individual payments up to the time of filing, while the second

foreclosure petition was filed *after* the loan was accelerated and, thus, was based on Herndon's default on the total remaining balance owed. As a result, the substitute trustee urges that, because the claim in the second foreclosure petition was not based upon the same transaction or occurrence as the first foreclosure petition, the two dismissal rule was not triggered by dismissal of the second foreclosure petition. We must reject the factual premise of the substitute trustee's argument on this point. The 4 November 2009 notice of hearing in support of the first foreclosure petition specifically states that the loan had been accelerated as of that date. However, in light of recent precedent from this Court, this factual point makes no difference in our resolution of the central question before us, to wit, whether the two dismissal rule was applicable in this matter.

"A creditor can seek to enforce payment of a promissory note by pursuing foreclosure by power of sale, judicial foreclosure, or by filing for a money judgment, or all three options, until the debt has been satisfied." *Lifestore Bank v. Mingo Tribal Pres. Trust*, __ N.C. App. __, __, 763 S.E.2d 6, 7 (2014), *disc. review denied*, __ N.C. __, 771 S.E.2d 306 (2015). "A foreclosure under power of sale is a type of special proceeding, to which our Rules of Civil Procedure apply[,]" *id.* at __, 763 S.E.2d at 9 (citation omitted), including Rule 41(a) which

> provides that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed an action based on or including the same claim. This provision is commonly referred to as the two dismissal rule. According to Rule 41(a)'s two dismissal rule, a second dismissal of an action asserting claims based upon the same transaction or occurrence as a previously dismissed action operates as an adjudication on the merits and bars a third action based upon the same set of facts. In order to determine whether a second action was based upon the same transaction or occurrence as a first action, we examine whether the claims in both actions were based upon the same core of operative facts and whether all of the claims could have been asserted in the same cause of action.

In re Foreclosure by Rogers Townsend & Thomas, PC, __ N.C. App. __, __, 773 S.E.2d 101, 103-04 (2015) (citations, internal quotation marks, brackets, ellipses, and footnote omitted) (hereinafter, "*Rogers Townsend & Thomas*").

The Herndons cite *Lifestore Bank* in arguing that the voluntary dismissal of the second foreclosure petition operated as an adjudication on the merits of the substitute trustee's claims such that Rule 41(a) required dismissal of the third foreclosure petition. Our review reveals a critical factual distinction between that case and the matter here that renders *Lifestore Bank* inapposite. In *Lifestore Bank*, the lender first sought to recover on two promissory notes by an action for foreclosure by power of sale which the lender later voluntarily dismissed. __ N.C. App. at __, 763 S.E.2d at 10. The lender also took a voluntary dismissal of its second action for foreclosure by power of sale. *Id.* The lender then filed a complaint which included claims for a money judgment on the two promissory notes, as well as for judicial foreclosure. *Id.* at __, 763 S.E.2d at 8. The trial court applied the two dismissal rule to dismiss the lender's claim for judicial foreclosure, and the lender appealed. *Id.* at __, 763 S.E.2d at 9. This Court reversed, noting that "a judicial foreclosure differs from a foreclosure by power of sale in that a judicial foreclosure is not a type of special proceeding and, as such, can be pursued by a creditor after a foreclosure by power of sale has failed." *Id.* at __, 763 S.E.2d at 12-13 (citations and internal quotation marks omitted). This Court thus reasoned that, "the two dismissal rule . . . [was] not applicable to [the lender's] claim for judicial foreclosure as [the lender] could not have brought a claim for judicial foreclosure in the same action as its claims for foreclosure by power of sale." *Id.* at __, 763 S.E.2d at 13 (citation omitted). Accordingly, the Court held that "[t]he two dismissal rule of Rule 41 does not bar a creditor from bringing an action for *judicial foreclosure* or for money judgment where the creditor has filed and then taken voluntary dismissals from two prior actions for foreclosure by power of sale." *Id.* at __, 763 S.E.2d at 7 (internal quotation marks omitted; emphasis in original). The issue before the Court in *Lifestore Bank* was the applicability of the two dismissal rule where *an action for judicial foreclosure and a money judgment* is filed following the voluntary dismissal of two previous actions for *foreclosure by sale*. By contrast, in the matter before us here, the issue is the applicability of the two dismissal rule where a third action for foreclosure by sale is brought following the voluntary dismissal of two previous actions for foreclosure by sale. Accordingly, the holding of *Lifestore Bank* is wholly inapplicable to the present appeal.

We acknowledge that the Court in *Lifestore Bank* remarked that "by taking two sets of voluntary dismissals as to its claims for foreclosure by power of sale, the second set of voluntary dismissals is an adjudication on the merits which bars [the lender] from undertaking a third foreclosure by power of sale action . . . ." *Id.* at __, 763 S.E.2d at 12 (internal

quotation marks omitted). However, because the lender never brought a third action for foreclosure by power of sale, the issue of the two dismissal rule's effect on a third action for foreclosure by power of sale was not before the *Lifestore Bank* Court. This observation, therefore, was mere *dicta* and does not control the resolution of the issue presented by this case. Recently, however, the appeal in *Rogers Townsend & Thomas* presented this Court with the opportunity to address as a matter of first impression the identical question before us here: whether the two dismissal rule bars a third action for foreclosure by power of sale following the voluntary dismissal of two previous actions for foreclosure by power of sale.

In *Rogers Townsend & Thomas*, the

> petitioners twice voluntarily dismissed foreclosure by power of sale actions against [the borrower] and they filed both notices of dismissal prior to resting their case. In addition, [the note holder] sought to accelerate [the borrower's] debt in both actions. Therefore, we must decide whether [the note holder]'s decision to accelerate the debt placed the entire balance of the note at issue and eliminated any factual distinctions between the two actions. If it did, the second action was based upon the same transaction or occurrence as the first one, and Rule 41 as well as the principles of *res judicata* will bar petitioners from bringing a third foreclosure by power of sale action on the same note. The dispositive issue, as we see it, is whether or not each failure to make a payment by a borrower under the terms of a promissory note and deed of trust constitutes a separate default, or separate period of default, such that any successive acceleration and foreclosure actions on the same note and deed of trust involve claims based upon different transactions or occurrences, thus exempting them from the two dismissal rule contained in Rule 41(a).

__ N.C. App. at __, 773 S.E.2d at 104 (italics added). After noting that our State's appellate courts had not addressed the issue directly, this Court reviewed related case law from North Carolina as well as the approaches to the two dismissal rule in foreclosure matters in other jurisdictions before holding that "a lender's election to accelerate payment on a note and foreclose on a deed of trust does not necessarily place future payments at issue such that the lender is barred from filing

subsequent foreclosure actions based upon subsequent defaults, or periods of default, on the same note." *Id.* at __, 773 S.E.2d at 106.

The Court went on to explain and apply its reasoning where two foreclosure actions with accelerated loans are dismissed voluntarily:

> In construing Rule 41(a)'s two dismissal rule, our courts have required the strictest factual identity between the original claim, and the new action, which must be based upon the same claim as the original action. Therefore, Rule 41(a) applies when there is an identity of claims, the determination of which depends upon a comparison of the operative facts constituting the underlying transaction or occurrence. If the same operative facts serve as the basis for maintaining the same defaults in two successive foreclosure actions, and the relief sought in each is based on the same evidence, the voluntary dismissal of those actions under Rule 41(a) bars the filing of a third such action.

Id. at __, 773 S.E.2d at 107 (citation, internal quotation marks, brackets, and ellipsis omitted). After comparing the operative facts at issue in the foreclosure by sale actions brought by the lender, the Court concluded:

> We find no strict factual identity between the two foreclosure by sale actions filed in this case. [The note holder]'s second action was not simply a continuation of its original action and it was not an attempt to relitigate the same alleged default. Certainly, in both foreclosure actions, the Clerk of Court would have to determine whether [the note holder] could establish that a default occurred between July 2009 and January 2012. But in the second foreclosure action, the Clerk would also have had to determine whether [the borrower] defaulted between January 2012 and July 2013—this is a claim that [the note holder] could not have brought in the first foreclosure action. Consequently, the operative facts and transactions necessary to the disposition of both actions gave rise to separate and distinct claims of default, and some of the particular default claims relevant to the second action could not have been brought in the first one. As the claims of default and particular facts at issue in each action differed, Rule 41(a)'s two dismissal rule does not apply. Accordingly, [the] petitioners' second voluntary dismissal did not operate as an adjudication on

> the merits and the principles of *res judicata* do not bar a third power of sale foreclosure action.

Id. at __, 773 S.E.2d at 108 (italics added). In so holding, the Court specifically distinguished the factual circumstances and procedural posture in *Rogers Townsend & Thomas* from those present in *Lifestore Bank*:

> [In *Lifestore Bank*,] the pertinent issue was whether Rule 41 barred the lender's claims for money judgments and judicial foreclosure. This Court held that, because an action for foreclosure by power of sale is a special proceeding, limited in jurisdiction and scope, the lender's money judgment and judicial foreclosure claims—though based upon the same core of operative facts—could not have been brought in the previously dismissed actions and, thus, were not barred by Rule 41(a)'s two dismissal rule. . . .
>
> . . . [W]e find that *Lifestore Bank* is easily distinguished from the instant case. Indeed, the *Lifestore Bank* Court did not reveal the alleged dates or periods of default relevant to the lenders' foreclosure by sale actions, and there was no mention that the debts were accelerated. Nor did the Court address the question whether each failure to make a payment by a borrower under the terms of a note secured by a deed of trust constitutes a separate default.

Id. at __, 773 S.E.2d at 104-05.

We perceive no difference between the relevant facts and procedural posture in *Rogers Townsend & Thomas* and the case before us. Here, the promissory note for $60,800.00 was executed on 3 August 2001 with payments due on the first day of each month from October 2001 through September 2031. The first foreclosure petition was filed on 4 November 2009 and thus covered defaults by Herndon between November 2007 and November 2009. The second foreclosure petition was filed on 8 December 2011, and therefore covered the additional defaults by Herndon each month from December 2009 through December 2011. The third foreclosure petition was filed on 21 February 2014, covering the further defaults by Herndon between 1 January 2012 and February 2014.

Just as in *Rogers Townsend & Thomas*, during each of these time periods, Herndon continued to default, and the "lender's election to accelerate payment on a note . . . [did] not necessarily place future payments at issue such that the lender [was] barred from filing subsequent

foreclosure actions based upon subsequent defaults, or periods of default, on the same note." *Id.* at __, 773 S.E.2d at 106. Applying this precedent, we reach the same holding. Because the "claims of default and particular facts at issue in each action differed, Rule 41(a)'s two dismissal rule does not apply" here, and therefore the dismissal of the second foreclosure petition "did not operate as an adjudication on the merits . . . ." *See id.* at __, 773 S.E.2d at 108. Accordingly, the substitute trustee is not barred from bringing a third action for foreclosure by power of sale, and the superior court's order dismissing the third foreclosure petition must be

REVERSED.

Judges STROUD and DAVIS concur.

STATE OF NORTH CAROLINA
v.
WILLIAM MILLER BAKER, DEFENDANT

No. COA15-649

Filed 19 January 2016

Rape—attempted—evidence not sufficient

The trial court erred by denying defendant's motion to dismiss a charge for attempted first-degree rape of a child where the victim testified to two incidents, one of which occurred on a couch and the other in her bedroom. As to the bedroom incident, she testified that some penetration had occurred, but had told a child abuse evaluation specialist in a recorded interview that she thought there had not been penetration. The State conceded that the video was not admitted as substantive evidence; therefore, while there may have been substantial evidence for the jury to find defendant guilty of rape, there was insufficient evidence to support his conviction for attempted rape based on the bedroom incident. The couch incident would support a conviction for indecent liberties but not for attempted rape.

Appeal by defendant from judgment entered 8 August 2014 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 18 November 2015.

Attorney General Roy Cooper, by Assistant Attorney General David Gordon, for the State.

Public Defender Jennifer Harjo, by Assistant Public Defender Brendan O'Donnell, for defendant.

ELMORE, Judge.

On 8 August 2014, a jury found William Miller Baker (defendant) guilty of attempted first-degree rape of a child and taking indecent liberties with a child. Based on defendant's prior record level IV, the trial court sentenced defendant to an active term of 240 to 297 months imprisonment. On appeal, defendant argues that the trial court erred in denying his motion to dismiss the attempted rape charge. Because the evidence of attempted rape was insufficient to submit to the jury, we vacate defendant's conviction for attempted first-degree rape of a child and remand for new sentencing.

I. Background

On 29 October 2013, defendant was indicted in superseding indictments for first-degree rape of a child in violation of N.C. Gen. Stat. § 14-27.2A(a), attempted first-degree rape of a child in violation of N.C. Gen. Stat. § 14-27.2A(a), and taking indecent liberties with a child in violation of N.C. Gen. Stat. § 14-202.1(a)(1). All offenses were alleged to have occurred on or about 1 April 2008 through 21 October 2009. The case came to trial on 7 August 2014 in Wake County Superior Court before the Honorable Paul C. Ridgeway.

The child victim, Amanda,[1] testified that in the summer of 2009, she was living with her mother, her two brothers, and defendant who, at the time, was her mother's boyfriend and the father of her youngest brother. Amanda and her brothers each had their own rooms in the house. Defendant also slept in his own room, while Amanda's mother usually slept on the couch downstairs. Amanda testified that on one particular occasion, after she had gone to bed, defendant came into her room, took off his shorts, and removed Amanda's pajama shorts and underwear. Defendant touched her vagina as she was lying on her stomach, and then "put his penis in [her] vagina." Amanda began kicking her feet and screaming into the pillow, but she was unable to turn her head to scream out loud "because [defendant's] face was around

1. We use this pseudonym to protect the identity of the minor child.

[her] head so [she] couldn't move." At some point, Amanda's mother came into the room when defendant was still on top of Amanda, naked. Amanda had her pajama shirt on but her shorts and underwear were around her knees. The three of them went downstairs and talked, and Amanda's mother told her that she should lock her door. The next morning, Amanda noticed that she was bleeding in her vagina.

Amanda also testified as to a specific incident with defendant that allegedly occurred in the fall of 2009, when she was in the sixth grade. Amanda had taken the bus home from school and was going to sit down on the couch to do her homework. As she passed by the kitchen, she noticed that defendant was there, drunk, and that there were "beer cans covering the table, on the floor, and there was glass everywhere." When she sat down on the couch, defendant came in, sat down next to her, and started touching her shoulder and chest. Defendant "tried to get [her] to lay down," and when asked at trial if she did, Amanda responded, "Sort of. And then I don't know what happened because he fell asleep so I moved." When defendant sat up, Amanda grabbed the phone, ran to her room, went into the closet, and called her mother. She told her mother, "He's touching me. Can you please come and get me[?]" Her mother then sent Amanda's grandparents to the house to pick her up.

Amanda first disclosed the alleged incidents to her aunt who, in turn, reported the allegations to Wake County Child Protective Services (CPS). Danielle Doyle, an investigator with Wake County CPS, was assigned to the case. Doyle coordinated with Peggy Marchant, a detective with the Cary Police Department, and visited Amanda at her school to conduct an interview. Amanda told Doyle and Marchant that defendant had fondled her breast, her genital area, and had tried to insert his penis into her vaginal area. At that point, Doyle stopped the interview and referred Amanda to the SafeChild Advocacy Center for further questioning and evaluation.

On 21 November 2011, Sara Kirk, a child abuse evaluation specialist at the SafeChild Advocacy Center, conducted an interview with Amanda as part of her child medical evaluation. During the interview, Amanda told Kirk that a couple of years earlier, defendant had touched her in her "private places" and that one time, "he tried to put his private in [hers]." Amanda recounted the couch incident and the bedroom incident, and when asked if defendant's private part went inside her private part in the bedroom, Amanda paused and said, "I don't think it did." A video recording of the interview was admitted into evidence as State's Exhibit 6, without objection or request for a limiting instruction.

Holly Warner, a nurse practitioner and former child medical evaluator at SafeChild, conducted Amanda's medical evaluation immediately after the interview. Warner testified that Amanda's genital exam was normal, meaning there were no signs of recent or healed trauma to the vaginal area. The medical evaluation report, which included Warner's findings and a summary of Kirk's interview, was admitted into evidence as State's Exhibit 1.

Jeanine Bolick, a licensed clinical social worker, was qualified and tendered as an expert in counseling and therapy. Bolick testified that Amanda participated in counseling sessions with her from 8 May 2012, until 11 June 2013, and that, based on Amanda's nightmares, her reluctance to talk about sexual abuse, and her becoming tearful when the subject came up, Bolick diagnosed Amanda with post-traumatic stress disorder (PTSD). Bolick also acknowledged, however, that she did not observe symptoms specific to sexual abuse, and that PTSD could be caused by a number of other factors.

Defendant testified in his own defense at trial. He denied that he ever tried to put his penis in Amanda's vagina or that he had ever gone into her room for that purpose. He also denied that there was a time when Amanda was in sixth grade that she came home from school and he was in the house. Defendant claimed that he never touched Amanda inappropriately.

At the close of the evidence, defendant moved to dismiss all charges against him. The trial court denied defendant's motion, and the three charged offenses were submitted to the jury. The jury found defendant guilty of attempted first-degree rape with a child and indecent liberties of a child. However, the jury was unable to reach a verdict on the charge of first-degree rape of a child, and a mistrial was declared on that count. The offenses were consolidated for judgment, and the trial court sentenced defendant to a minimum of 240 months and a maximum of 297 months imprisonment. Defendant appeals.

II. Discussion

Defendant argues that the trial court erred in denying his motion to dismiss at the close of the evidence because there was insufficient evidence to support the charge of attempted first-degree rape of a child. We agree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " 'Upon defendant's motion for dismissal, the question for the Court is

whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

N.C. Gen. Stat. § 14-27.2A(a) (2013) provides, "A person is guilty of rape of a child if the person is at least 18 years of age and engages in vaginal intercourse with a victim who is a child under the age of 13 years." "Vaginal intercourse is defined as 'penetration, however slight, of the female sex organ by the male sex organ.' " *State v. Combs*, 226 N.C. App. 87, 90, 739 S.E.2d 584, 586 (quoting *State v. Fletcher*, 322 N.C. 415, 424, 368 S.E.2d 633, 638 (1988)), *disc. rev. denied*, 366 N.C. 596, 743 S.E.2d 220 (2013).

Pursuant to N.C. Gen. Stat. § 15-170 (2013), a defendant may be convicted of the crime charged in the indictment, "or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime." "In order to prove an attempt of any crime, the State must show: '(1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense.' " *State v. Sines*, 158 N.C. App. 79, 85, 579 S.E.2d 895, 899 (quoting *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996)), cert. denied, 357 N.C. 468, 587 S.E.2d 69 (2003).

In a prosecution for attempted rape, "[t]he State is not required to show that the defendant made an actual physical attempt to have intercourse . . . ." *State v. Schultz*, 88 N.C. App. 197, 200, 362 S.E.2d 853, 855 (1987) (citing *State v. Hudson*, 280 N.C. 74, 77, 185 S.E.2d 189, 191 (1971), *cert. denied*, 414 U.S. 1160, 39 L. Ed. 2d 112 (1974)), *aff'd per curiam*, 322 N.C. 467–68, 368 S.E.2d 386 (1988). The intent element is satisfied "if the evidence shows that defendant, at any time during the incident, had an intent to gratify his passion upon the victim, notwithstanding

any resistance on her part." *Id.* (citing *State v. Moser*, 74 N.C. App. 216, 220, 328 S.E.2d 315, 317 (1985)). "Intent is an attitude or emotion of the mind and is seldom, if ever, susceptible of proof by direct evidence, it must ordinarily be proven by circumstantial evidence, i.e., by facts and circumstances from which it may be inferred." *State v. Gammons*, 260 N.C. 753, 756, 133 S.E.2d 649, 651 (1963) (citations omitted).

Both defendant and the State agree that there are only two events upon which the attempted rape conviction could be based: the bedroom incident and the couch incident. As to the bedroom incident, defendant argues that Amanda's in-trial testimony, if believed, could support a conviction for first-degree rape but not for attempt, and conversely, that Amanda's interview with Kirk could support a conviction for attempted rape but not for the completed offense. Defendant also claims that the interview was admitted solely for corroborative or impeachment purposes, and accordingly, the only substantive evidence of the bedroom incident, Amanda's testimony at trial, is insufficient to support a conviction for attempted rape. As to the couch incident, defendant contends that Amanda's in-trial testimony could, at most, support the indecent liberties conviction. Therefore, while there may have been substantial evidence for the jury to find defendant guilty of rape, based on the bedroom incident, and of taking indecent liberties with a child, based on the couch incident, there was insufficient evidence to support his conviction for attempted rape.

Defendant's argument first assumes that the video-taped interview was admitted to corroborate or impeach Amanda's in-trial testimony, but not as substantive evidence of the bedroom incident. In support of his position, defendant points to the trial court's final charge to the jury, which includes the following instruction on impeachment or corroboration by a prior statement:

> Evidence has been received tending to show that at an earlier time a witness made a statement that may conflict or be consistent with the testimony of the witness at trial. You must not consider such earlier statements as evidence of the [truth of] what was said at the earlier time because it was not made here under oath at this trial. If you believe the earlier statement was made and that it conflicts with the testimony of the witness at this trial, you may consider it and all of the facts bearing on the witness's truthfulness in deciding whether you will believe or disbelieve a witness's testimony.

At trial, the State did not specify the purpose for which the video was being offered. On appeal, however, the State concedes that the video was not admitted as substantive evidence. Therefore, while Amanda's corroborated testimony about the bedroom incident could support a conviction for a completed rape, the State failed to present any substantive evidence of attempted rape. *See State v. Batchelor*, 190 N.C. App. 369, 373–75, 660 S.E.2d 158, 162 (2008) (finding no substantive evidence of defendant's guilt where jury's consideration of hearsay testimony was limited to impeachment based on trial court's final instruction regarding prior inconsistent statements).

Nevertheless, the State argues that even if there was insufficient evidence from the bedroom incident to support defendant's attempted rape conviction, Amanda's testimony regarding the couch incident was sufficient to do so. We disagree.

Amanda's in-trial testimony, in which she described the couch incident, tended to show that defendant, who appeared drunk, sat down next to Amanda on the couch, touched Amanda's shoulder and chest, and tried to get Amanda to lie down. Amanda testified that she "sort of" lay down, but then defendant fell asleep, so she moved. In the light most favorable to the State, this evidence may be sufficient to show that defendant acted "for the purpose of arousing or gratifying sexual desire" under the indecent liberties statute, N.C. Gen. Stat. § 14-202.1(a) (2013), but it does not support an inference that he intended to rape Amanda. Nor are we persuaded by the State's attempt to analogize these facts to those more egregious cases in which evidence of assault with intent to rape or attempted rape was found to be legally sufficient. *See*, *e.g.*, *State v. Whitaker*, 316 N.C. 515, 519, 342 S.E.2d 514, 517 (1986) (finding sufficient evidence of kidnapping to facilitate attempted second-degree rape where the defendant grabbed the victim by the throat, ordered her to drive to a secluded area, told her, "I want to eat you," and commanded her to pull her pants down to her knees); *Shultz*, 88 N.C. App. at 201, 362 S.E.2d at 856 (finding sufficient evidence of intent to rape where the victim testified that the defendant "dragged her down a hallway toward a guest bedroom, and that he put his hand down over her shoulder and down the front of her shirt and grabbed her breasts"); *State v. Hall*, 85 N.C. App. 447, 453, 355 S.E.2d 250, 254 (1987) (finding sufficient evidence of attempted rape where the defendant, "who had just been released from prison after serving a sentence for assault with intent to rape," took no interest in the victim's wallet or car, "wrapped his arm around the victim's neck, pulled her shirt down, touched her breasts with his hands, and physically abused her").

III. Conclusion

We conclude that the trial court erred in denying defendant's motion to dismiss the charge against defendant for attempted first-degree rape of a child. The State failed to present substantial evidence of all elements of attempted rape based on either the bedroom incident or the couch incident. As this issue is dispositive, we need not address defendant's second argument. Defendant's conviction for attempted first-degree rape of a child is vacated and the case remanded for new sentencing. Defendant's conviction for indecent liberties remains undisturbed.

VACATED IN PART AND REMANDED; NEW SENTENCING.

Judges CALABRIA and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
JAMES ANTHONY BARNETT, JR.

No. COA15-200

Filed 19 January 2016

1. Criminal Law—deterring witness by threats—letters

Defendant argued that the trial court improperly denied his motions to dismiss charges of deterring a witness by threats. Excerpts from two letters from defendant to the victim that were specifically referenced in the indictment, along with other letters, included language that a reasonable juror could interpret as threatening or attempting to threaten the victim to prevent her from appearing in court.

2. Criminal Law—deterring witness by threats—witness summoned—indictment number of underlying case—surplusage

In a prosecution for deterring a witness by threats, the indictment's allegation of a specific indictment number for the underlying case was surplusage which the State did not have to prove where the indictment charged that the witness had been summoned.

3. Criminal Law—deterring witness by threats—letters—not received by victim

In a prosecution for deterring a witness, the State presented ample evidence of threats made by defendant to inflict bodily harm

against a prospective witness against him. The fact that the witness and her daughter did not receive those letters was irrelevant because the crime of deterring a witness may be shown by actual intimidation or attempts at intimidation.

4. Criminal Law—deterring witness by threats—instructions—no plain error

In a prosecution for deterring a witness, there was no plain error in the instructions, considered as a whole, where defendant alleged that one instruction did not include the word "threat," the court did not repeat the instructions in their entirety for each charge, and the court did not instruct the jury that it must find that defendant deterred the victim from appearing in the specific cases identified by number in the indictments.

5. Assault—habitual—subject matter jurisdiction

The trial court did not lack subject matter jurisdiction over a habitual assault charge where the indictment's first count, misdemeanor assault, properly alleged all elements but did not mention defendant's prior assault convictions, as required by N.C.G.S. § 15A-928(a). The second count, habitual misdemeanor assault, alleged that the defendant had been previously convicted of two or more misdemeanor assaults in violation of N.C.G.S. § 14-33.2 and listed the dates of those prior convictions.

6. Sentencing—satellite-based monitoring—registration as sex offender—attempted second-degree rape

A lifetime satellite-based monitoring order and an order requiring registration as a sex offender were reversed and remanded where the trial court erroneously concluded that attempted second-degree rape is an aggravated offense. A conviction for attempted rape does not require penetration and thus does not fall within the statutory definition of an aggravated offense.

7. Sentencing—no contact order—person other than victim

Plain statutory language limited the trial court's authority to enter a no contact order protecting anyone other than the victim. The trial court did not have authority under the catch-all provision to enter a no contact order specifically including persons who were not victims of the sex offense committed by defendant. N.C.G.S. § 15A-1340.50 consistently and repeatedly refers only to the victim and not to any other person.

STATE v. BARNETT

[245 N.C. App. 101 (2016)]

Appeal by Defendant from judgments entered 16 July 2014 by Judge Edwin G. Wilson in Rockingham County Superior Court. Heard in the Court of Appeals 23 September 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Iain M. Stauffer, for the State.

Brendan O'Donnell, Assistant Public Defender, and Jennifer Harjo, Public Defender, for Defendant.

INMAN, Judge.

Defendant James Anthony Barnett, Jr. ("Defendant") appeals the judgments entered after a jury convicted him of attempted second degree rape, two counts of deterring an appearance by a witness, and assault on a female. Defendant also appeals the postconviction orders entered imposing lifetime satellite-based monitoring ("SBM"), lifetime sex offender registration, and a permanent no contact order. On appeal, Defendant argues that: (1) his convictions for deterring a witness by threats were not supported by legally sufficient evidence; (2) the trial court committed plain error when instructing on the charges of deterring a witness; (3) the habitual misdemeanor assault indictment was fatally defective; (4) the trial court erred in finding that attempted second degree rape is an aggravated offense requiring lifetime SBM and sex offender registration; and (5) the trial court lacked authority to enter a permanent no contact order prohibiting Defendant from contacting the victim's children.

After careful review, we conclude that Defendant received a trial free from error. However, we reverse the trial court's order imposing lifetime SBM and reverse and remand the lifetime sex offender registration order for entry of an order consistent with this opinion. We also vacate the permanent no contact order and remand for entry of an order consistent with this opinion.

Background

The State's evidence introduced at trial tended to show the following: In late January 2013, Winnie Johnson ("Ms. Johnson" or "the victim")[1] met Defendant on a call-in chat line. They began dating shortly thereafter. On or about 29 January 2013, Defendant was taken into

1. A pseudonym has been used to protect the identity of the victim.

custody and incarcerated at the Alamance County jail for a matter unrelated to this appeal. Following Defendant's release from jail on 14 March 2013, Defendant moved into Ms. Johnson's apartment in Eden, North Carolina. The victim's three daughters, then aged 13, 10, and almost 1, also lived in the apartment.

On or about 22 April 2013, Defendant left the apartment to go to Burlington to meet with his probation officer. While he was away, Ms. Johnson called him to say that she no longer wanted to date him. Although they were in contact via phone and text and Defendant repeatedly requested that Ms. Johnson bring him his clothes, they did not see each other until 22 May 2013, when Defendant showed up at Ms. Johnson's apartment door. Ms. Johnson let Defendant inside. Defendant asked Ms. Johnson to get his clothes, and Ms. Johnson asked him to wait in the living room while she retrieved them.

When Ms. Johnson returned to the living room with Defendant's clothes, Defendant asked for a hug, and Ms. Johnson obliged. Defendant asked Ms. Johnson to engage in sexual intercourse. She repeatedly refused and asked Defendant to leave. Ms. Johnson left the living room and walked down the hall and into a bathroom "to kill time." Defendant followed her to the bathroom and stood outside the door. When Ms. Johnson tried to leave the bathroom, Defendant blocked her way, pushed her into a bedroom, threw her onto the floor and then onto a bed, and began trying to have sexual intercourse with her while repeatedly hitting her in the head and face.

Defendant testified at trial and denied trying to rape Ms. Johnson, but he admitted he "pushed her," "grabbed her by her waist," "punched her in the back of the head," and hit her several more times. Defendant testified that he stopped hitting Ms. Johnson and left her home once she promised she would not have sex with anyone else.

Ms. Johnson testified that before leaving her apartment, Defendant said he would kill her if she called the police. Ms. Johnson then asked a neighbor to call 911. The responding officer testified that when he arrived, Ms. Johnson was crying, disheveled, and had "severe bruises" on her face and body and "a lot of swollen . . . lumps on her head." Ms. Johnson was treated and released from the hospital the same day. She testified that following her release from the hospital, she immediately began receiving text messages from Defendant which included threats to kill her.

Defendant was arrested on 29 May 2013 and charged with assault, kidnapping, and rape. After being taken into custody, Defendant began

sending Ms. Johnson threatening letters from jail. Details of those letters are discussed in the relevant sections below.

On 8 July 2013, Defendant was indicted on one count of attempted second degree rape, one count of second degree kidnapping, two counts of deterring an appearance by a witness, one count of assault on a female, one count of habitual misdemeanor assault, and having attained habitual felon status. On 16 July 2014, a jury convicted Defendant of attempted second degree rape, two counts of deterring an appearance by a witness, and assault on a female. Defendant admitted the prior misdemeanor assaults underlying the habitual misdemeanor assault charge and pled guilty to habitual felon status.

The trial court sentenced Defendant to two consecutive terms of 110 to 144 months imprisonment. It also ordered Defendant to register as a sex offender and enroll in SBM for life, and permanently prohibited Defendant from communicating with Ms. Johnson or her three children.

Defendant gave notice of appeal in open court.

Analysis

I. Sufficiency of Evidence of Deterring a Witness

[1] Defendant first argues that the trial court improperly denied his motions to dismiss the charges of deterring a witness by threats. According to Defendant, the convictions were not supported by legally sufficient evidence because "the [victim] was pressured to stay away from court without any threats," or in the alternative, because to the extent that any threats were made, "they related to the parties' personal relationship and not to [this case]." These arguments are without merit.

A trial court's denial of a motion to dismiss is reviewed *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "When considering a motion to dismiss, the trial court must determine whether there is sufficient evidence of each essential element of the offenses charged. . . . If there is sufficient evidence to submit the case to the jury, the motion to dismiss must be denied." *State v. Wade*, 181 N.C. App. 295, 299, 639 S.E.2d 82, 86 (2007) (citation omitted). The evidence must be viewed "in the light most favorable to the State, giving the State the benefit of all reasonable inferences," *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (2000), and "resol[ve] any contradictions in [the State's] favor," *State v. Greenlee*, 227 N.C. App. 133, 136, 741 S.E.2d 498, 500 (2013) (internal quotation marks and citation omitted).

N.C. Gen. Stat. § 14-226(a) provides that a defendant is guilty of intimidating or interfering with a witness if

> by threats, menaces or in any other manner [the defendant] intimidate[s] or attempt[s] to intimidate any person who is summoned or acting as a witness in any of the courts of this State, or prevent[s] or deter[s], or attempt[s] to prevent or deter any person summoned or acting as such witness from attendance upon such court.

On appeal, Defendant contends that his motion to dismiss should have been granted because: (1) the two letters introduced at trial to support the first count of deterring a witness did not contain any threats; (2) there was no evidence "presented at trial as to the particular court case in which [Ms. Johnson] had been summoned" which was identified in the first count as 13 CR 51545; (3) there was no evidence presented at trial that Defendant attempted to deter Ms. Johnson from acting as a witness in 13 CR 51698, the case identified in the second count of the indictment; and (4) the dates of offense listed on the indictments did not accurately state the dates of the letters sent to Ms. Johnson and her daughter that contained the threats.

At trial, the State introduced eight letters that Defendant wrote to Ms. Johnson or one of her daughters between 31 May 2013 and 4 August 2013, including one postmarked 4 June 2013 (the date cited in the first count of deterring or attempting to deter a witness) and one postmarked 20 June 2013 (the dated cited in the second count). Excerpts from the two letters specifically referenced in the indictment and other letters include language that, in light of the evidence at trial, a reasonable juror could interpret as threatening or attempting to threaten Ms. Johnson to prevent her from appearing in court.

A. Count I

Ms. Johnson testified at trial that before leaving her home on the day of the assault and attempted rape, Defendant threatened to kill her if she called the police. Defendant reminded her of that threat in a letter postmarked 4 June 2013. Defendant wrote to Ms. Johnson:

> What did I tell you, [sic] would happen, if you took charges; [sic] out on me? You remember what I told you. And I'ma [sic] stand by my word. Because you knew not to press charges or go to the hospital. You knew better then [sic] that. Then on top of all that, you lied to the police; about what happen. These charges are fake as hell. Then you saying that I raped you or attempted to rape you.

Later in that letter, Defendant wrote: "I miss you deeply and love you like crazy. You are not just going to walk, [sic] away from me this easily. Because before you do so, I will kill you or have you killed." Construing this letter with Defendant's earlier threats, a jury could reasonably interpret this letter to constitute a threat of bodily harm or death against Ms. Johnson while she was acting as a witness for the prosecution.

[2] Defendant also contends that the State had to prove the specific court proceeding that he attempted to deter Ms. Johnson from attending since the case number was listed in the indictment. We disagree because the specific case number identified in the first count, 13 CR 51545, is irrelevant information not necessary to support an essential element of the crime. *See State v. Taylor*, 280 N.C. 273, 276, 185 S.E.2d 677, 680 (1972) ("Allegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage. The use of superfluous words should be disregarded.").

The essential elements of the offense of deterring a witness are that the defendant threatens, menaces, or in any other manner: (1) intimidates or attempts to intimidate a person who is summoned or acting as a witness in any state court, or (2) prevents, deters, or attempts to prevent or deter a person who is summoned or acting as a witness. N.C. Gen. Stat. § 14-226(a).

The indictment stated:

> The jurors for the State upon their oath present that on or about the dates of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did by threats attempt to deter and attempt to prevent [Ms. Johnson] from attending court by threatening to kill her if she appeared. [Ms. Johnson] was summoned as a witness in Rockingham County District Court, Case Number 13CR51545.

Because the indictment charged the "summoned" or "acting as a witness" element by stating that Ms. Johnson had been summoned as a witness in a state court, the actual court number of the case listed is merely surplusage and irrelevant. *See generally State v. Huckelba*, __ N.C. App. __, __, 771 S.E.2d 809, 826 (2015) (concluding that the indictment language identifying the physical address of High Point University was surplusage where the indictment alleged all the essential elements of the crime: that the defendant knowingly possessed a pistol on educational property, High Point University), *rev'd per curiam on other grounds*, __ N.C. __ (No. 156A15), 2015 WL 9265789, at *1 (Dec. 18, 2015)

(reversing based solely on the defendant's failure to establish plain error in the jury instructions). Furthermore, the language of the letter clearly indicates that Defendant was trying to prevent Ms. Johnson from further prosecuting the charges arising from the May 2013 incident. Therefore, the duplicative information about the actual court case Ms. Johnson was being summoned to be a witness for was surplusage and was not a fact which the State was required to allege and prove. *See State v. Springer*, 283 N.C. 627, 637, 197 S.E.2d 530, 537 (1973).

B. Count II

[3] In a letter to Ms. Johnson postmarked 20 June 2013, the date of the offense listed in the second count of the indictment for deterring a witness, Defendant reiterated, "You know what I told you, before I left your house." In that same letter, Defendant told Ms. Johnson twice not to come to court on 25 June 2013, and referenced "order[ing] [his] hits." In his 20 June 2013 letter to one of Ms. Johnson's daughters, Defendant said if Ms. Johnson did not drop the charges against him he would "order some things to happen which means I will never get out of prison again. . . . I will never see the courtroom. And neither will your mama. She will be dead because of my orders." In that same letter, Defendant wrote, "Get your mama not to come to court, on Tuesday June 25, 2013."

Defendant's other letters to Ms. Johnson make clear that "ordering a hit" was a threat to murder her. Defendant wrote that he would "put [her] below before [she could put him] away for X amount of years" and threatened to "send [his] lil CRIP homies at [her and her] family."

In the instant case, the State presented ample evidence of threats made by Defendant to inflict bodily harm on Ms. Johnson, a prospective witness in the case against him. *See State v. Williams*, 186 N.C. App. 233, 237, 650 S.E.2d 607, 609-10 (2007). Moreover, the fact that Ms. Johnson and her daughter did not receive these letters is irrelevant because the crime of deterring a witness may be shown by actual intimidation or attempts at intimidation. *See* N.C. Gen. Stat. § 14-226(a). Furthermore, as discussed above, the specific case number of the court case Ms. Johnson was acting as a witness for was surplusage and was not a necessary evidentiary showing that the State was required to make. Accordingly, we hold that the trial court did not err in denying Defendant's motion to dismiss these charges.

II. Jury Instructions on Deterring a Witness

[4] Defendant next argues that the trial court committed plain error in its jury instructions on the charges of deterring a witness. Defendant

challenges the trial court's failure to include the word "threat" in one of its deterring a witness instructions, its failure to repeat the deterring a witness instructions in their entirety for each of the two charges, and its failure to instruct the jury that it must find Defendant deterred Ms. Johnson from appearing in case nos. 13 CR 51545 and 51698, the specific case numbers identified in the indictments. We disagree.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal quotation marks omitted).

The two counts of deterring a witness involved identical legal elements. In explaining these charges, the trial court instructed the jury that in order to find Defendant guilty of deterring a witness under N.C. Gen. Stat. § 14-226, it must find three essential elements beyond a reasonable doubt, including that Defendant "did so by threats." The trial court omitted this part of the instruction in its final mandate on the two charges. Instead, the trial court instructed that

> if you find from the evidence beyond a reasonable doubt that on or about the alleged date a person was summoned as a witness in a court of this state, and that the defendant intentionally attempted to prevent or -- attempted to deter or deterred that witness from attending court, it would be your duty to return a verdict of guilty.

Defendant contends that this omission constituted plain error.

In light of the trial court's thorough instructions on the elements of these charges, this argument is without merit. "Where the instructions to the jury, *taken as a whole*, present the law fairly and clearly to the jury, [the reviewing Court] will not find error even if isolated expressions, standing alone, might be considered erroneous." *State v. Morgan*, 359 N.C. 131, 165, 604 S.E.2d 886, 907 (2004) (emphasis added). Further, applying the plain error standard, Defendant has failed to show that the trial court's single omission of the word "threat" in one instruction had a probable impact on the jury's verdict.

Defendant also argues that the trial court erred by not reading the entire instruction for each separate charge of deterring a witness, instead telling the jury:

> [T]he defendant has been charged with two counts of deterring the appearance by a witness. It's the same–the law is the same on both counts. I'm not going to read it twice. The first count is the one simply that was alleged to have occurred on June 4, 2013, and the second is the one that is alleged to have occurred on June 20, 2013.

Again, evaluated in the context of all the instructions on the charges of deterring a witness, Defendant has failed to show plain error. The trial court repeatedly instructed the jury that there were two separate charges, to be considered individually, and accurately instructed that the necessary elements for both charges were identical. He also properly instructed the jury that the only difference was the date of offense. Thus, construing these instructions in their entirety, the trial court did not err by not repeating the instructions verbatim.

Finally, Defendant argues that the trial court committed plain error by not instructing the jury that it must find Defendant deterred Ms. Johnson from appearing in the specific cases listed in the indictment. As discussed above, the actual court case Ms. Johnson was being summoned to be a witness for was surplusage and not an element of the offense. *See Springer*, 283 N.C. at 637, 197 S.E.2d at 537. Thus, the trial court did not commit error, much less plain error, by failing to mention the specific case numbers.

III. Sufficiency of the Habitual Misdemeanor Assault Indictment

[5] Defendant argues that the second count in the indictment for habitual misdemeanor assault failed to allege all the elements of habitual misdemeanor assault because it did not recite all the elements of the offense. We disagree, because the first count in the indictment, alleging misdemeanor assault, alleged all necessary elements of the habitual offense except for the existence of Defendant's prior convictions.

"This Court reviews challenges to the sufficiency of an indictment using a *de novo* standard of review." *State v. Pendergraft*, __ N.C. App. __, __, 767 S.E.2d 674, 679 (2014).

The indictment for 13 CR 1307 included two counts: (1) assault on a female under N.C. Gen. Stat. § 14-33; and (2) habitual misdemeanor assault under N.C. Gen. Stat. § 14-33.2. Defendant's indictment for misdemeanor assault specifically alleged that Defendant (1) assaulted a

female person, (2) "caused physical injury to the victim, [specifically] bruises to her head and face," and (3) was a male at least 18 years of age, and Defendant does not dispute that the first count of the indictment properly alleged all elements of assault on a female under N.C. Gen. Stat. § 14-33. Instead, Defendant contends that the second count of the indictment fails to properly allege habitual misdemeanor assault because it did not include "two critical elements": (1) a violation of N.C. Gen. Stat. § 14-33, and (2) a physical injury. Consequently, Defendant contends that the trial court lacked subject matter jurisdiction to enter judgment for habitual misdemeanor assault.

A defendant is guilty of habitual misdemeanor assault, a Class H felony, if

> that person violates any of the provisions of G.S. 14-33 and causes physical injury, or G.S. 14-34, and has two or more prior convictions for either misdemeanor or felony assault, with the earlier of the two prior convictions occurring no more than 15 years prior to the date of the current violation.

N.C. Gen. Stat. § 14-33.2. For purposes of Defendant's habitual misdemeanor assault charge, the lower grade offense of assault on a female becomes an element of a higher grade offense. *See State v. Burch*, 160 N.C. App. 394, 396, 585 S.E.2d 461, 463 (2003). Thus, to prove Defendant guilty of habitual misdemeanor assault, the State was required to prove the following elements: (1) Defendant was convicted of two misdemeanor assaults, specifically the assaults listed in Count II of the indictment (the 9 September 1999 assault on a government official and the 5 April 2007 assault on a female); (2) Defendant assaulted Ms. Johnson on 22 May 2013, as alleged in Count I of the indictment; and (3) the assault on Ms. Johnson caused physical injury, also alleged in Count I of the indictment.

At the outset, we address the applicability of a N.C. Gen. Stat. § 15A-928 "special accompanying indictment" for a charge of habitual misdemeanor assault. Even though the language of subsection (a) of N.C. Gen. Stat. § 15A-928 appears to limit its applicability to status offenses, this Court has repeatedly concluded that substantive habitual offenses, such as habitual misdemeanor assault and habitual impaired driving, are likewise governed by Chapters 15A and 20, including N.C. Gen. Stat. § 15A-928, unlike habitual status offenses, which are governed by Chapter 14. *Id.; see also State v. Williams*, 153 N.C. App. 192, 194, 568 S.E.2d 890, 892 (2002) (noting that to properly charge a defendant with

felony misdemeanor assault, the prosecutor may use a "special accompanying indictment" pursuant to N.C. Gen. Stat. § 15A-928(b)).

It is undisputed that Count I of the indictment properly alleged all of the elements of assault on a female, a violation of N.C. Gen. Stat. § 14-33, and included the element that Ms. Johnson suffered physical injury as a result. However, Count II of the indictment, which charged Defendant with habitual misdemeanor assault and properly referenced Defendant's two prior misdemeanor assaults that occurred less than 15 years prior to the date of his current violation, did not include any language regarding Defendant's current charge of assault on a female resulting in a physical injury, a necessary showing for a N.C. Gen. Stat. § 14-33.2 violation. Consequently, Defendant contends that the habitual misdemeanor assault indictment was "fatally defective" for failing to allege all the necessary elements of habitual misdemeanor assault.

This Court rejected arguments similar to Defendant's in *State v. Lobohe*, 143 N.C. App. 555, 547 S.E.2d 107 (2001), and that decision is controlling in this case. In *Lobohe*, 143 N.C. App. at 558-59, 547 S.E.2d at 109-10, the defendant was indicted for one count of impaired driving and a second count of habitual impaired driving. The first count alleged all elements of impaired driving, and the second count alleged the defendant's three prior convictions. *Id.* The defendant argued the second count was fatally defective because it failed to allege all statutory elements of habitual impaired driving[2] as required by N.C. Gen. Stat. 15A-924, which provides in part that a criminal indictment must contain "[a] plain and concise factual statement in each count . . . supporting every element of a criminal offense and the defendant's commission thereof . . . ." N.C. Gen. Stat. 15A-924(a)(5). This Court rejected that argument, noting that the statute also provides that "[i]n trials in superior court, allegations of previous convictions are subject to the provisions of G.S. 15A–928." *Lobohe*, 143 N.C. App. at 558, 547 S.E.2d at 109; N.C. Gen. Stat. 15A-924(c). In turn, section 15A-928 provides in pertinent part:

> (a) When the fact that the defendant has been previously convicted of an offense raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter, an indictment or information for the higher offense may not allege the previous conviction. If a reference to a

2. "A person commits the offense of habitual impaired driving if he drives while impaired . . . and has been convicted of three or more offenses involving impaired driving . . . within 10 years of the date of this offense." N.C. Gen. Stat. § 20-138.5(a).

> previous conviction is contained in the statutory name or title of the offense, the name or title may not be used in the indictment or information, but an improvised name or title must be used which labels and distinguishes the offense without reference to a previous conviction.
>
> (b) An indictment or information for the offense must be accompanied by a special indictment or information, filed with the principal pleading, charging that the defendant was previously convicted of a specified offense. At the prosecutor's option, the special indictment or information may be incorporated in the principal indictment as a separate count.

N.C. Gen. Stat. 15A-928(a)-(b).

We concluded in *Lobohe* that the indictment for habitual impaired driving complied with the requirements of both 15A-924 and 15A-928. The first count, impaired driving, did not allege the defendant's prior convictions, as required by 15A-928(a). *Id.* at 558, 547 S.E.2d at 109. The second count, which was "contained as a separate count in the principal indictment as permitted by section 15A–928(b)," alleged the defendant's prior convictions. *Id.* This "follow[ed] precisely the required format set forth in section 15-928." *Id.* This Court explicitly rejected the defendant's argument that "an indictment which complies with section 15A–928 is in violation of section 15A–924 because it does not contain in one count the elements of impaired driving as well as the elements which elevate the offense of impaired driving to that of habitual impaired driving." *Id.* at 559, 547 S.E.2d at 109.

Following *Lobohe*, we conclude that Defendant's indictment for habitual misdemeanor assault complied with sections 15A-924 and 15A-928.[3] The indictment's first count, misdemeanor assault, properly alleged all elements, including "caus[ing] physical injury to the victim." It did not mention Defendant's prior assault convictions, as required by § 15A-928(a). The second count, habitual misdemeanor assault, alleged that "the defendant has been previously convicted of two or more misdemeanor assaults" in violation of N.C. Gen. Stat. § 14-33.2 and listed the dates of those prior convictions. The latter charge was included

3. We note that habitual misdemeanor assault, like habitual impaired driving, is a substantive offense. *Lobohe*, 143 N.C. App. at 559, 547 S.E.2d at 110; *State v. Smith*, 139 N.C. App. 209, 213-14, 533 S.E.2d 518, 519-20 (2000).

"as a separate count in the principal indictment as permitted by section 15A–928(b)," *see Lobohe*, 143 N.C. App. at 558, 547 S.E.2d at 109. Accordingly, the indictment was sufficient, and the trial court did not lack subject matter jurisdiction over the habitual assault charge.

IV. Imposition of Lifetime Satellite-Based Monitoring and Sex Offender Registration and Entry of Permanent No Contact Order

[6] Defendant next argues that the trial court violated various statutory provisions by imposing lifetime SBM, lifetime sex offender registration, and a permanent no contact order that included the victim's family members. Because Defendant failed to give written notice of appeal from any of these orders, he seeks review by petition for writ of *certiorari* and, with respect to two of the orders, the State concedes error. Given these circumstances, we will allow the petition and review these orders.

Defendant's arguments allege statutory errors which we review *de novo*. *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011) (internal citation omitted).

A. Lifetime SBM and Sex Offender Registration

Defendant argues, and the State concedes, that the trial court erroneously concluded that attempted second degree rape is an aggravated offense under N.C. Gen. Stat. § 14-208.6(1a) and, in doing so, violated N.C. Gen. Stat. § 14-208.40A (SBM statute) and N.C. Gen. Stat. §§ 14-208.7 and 14-208.23 (sex offender registration order statutes). We agree. Accordingly, we reverse the lifetime SBM order, and reverse and remand the registration order for entry of an order requiring Defendant to register as a sex offender for a period of thirty years.

In North Carolina, a defendant convicted of an aggravated offense must enroll in lifetime SBM. *See* N.C. Gen. Stat. § 14-208.40A(c). A defendant convicted of an aggravated offense is also subject to mandatory lifetime sex offender registration. N.C. Gen. Stat. § 14-208.23. However, an offender who has committed a reportable, but non-aggravated, offense, and whose offense does not otherwise require lifetime registration, is subject to mandatory registration order for a period of thirty years. N.C. Gen. Stat. § 14-208.7(a).

North Carolina law defines an aggravated offense as

> any criminal offense that includes either of the following: (i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or threat of serious violence; or (ii) engaging in a

> sexual act involving the vaginal, anal, or oral penetration with a victim who is less than 12 years old.

N.C. Gen. Stat. § 14-208.6(1a). Thus, pursuant to G.S. § 14-208.6(1a), an aggravated offense requires a sexual act involving an element of penetration.

Here, Defendant was convicted of attempted second degree rape. A conviction for attempted rape does not require penetration, and thus does not fall within the statutory definition of an aggravated offense. *See State v. Davison*, 201 N.C. App. 354, 364, 689 S.E.2d 510, 517 (2009) (when determining whether to impose satellite-based monitoring, "the trial court is only to consider the elements of the offense of which a defendant was convicted and is not to consider the underlying factual scenario giving rise to the conviction."). The trial court erred in its finding to the contrary. *See id.*, 201 N.C. App. at 362, 689 S.E.2d at 515 ("[W]hile a completed first-degree sexual offense would be an aggravated offense, an attempted first-degree sexual offense is not an aggravated offense."). Because the trial court's imposition of lifetime SBM was based solely on the trial court's finding that attempted second degree rape is an aggravated offense, we must reverse the order requiring lifetime SBM.

Similarly, the trial court's order requiring Defendant register as a sex offender for his lifetime was based only on its finding that attempted second degree rape is an aggravated offense. As noted, because attempted second degree rape is a non-aggravated offense, we must also reverse the registration order. However, because attempted second degree rape constitutes a sexually violent offense, it is a reportable conviction. *See* N.C. Gen. Stat. §§ 14-208.6(4)(a), 14-208.6(5). Therefore, on remand, the trial court should enter a registration order requiring Defendant to register as a sex offender for a period of thirty years. *See* N.C. Gen. Stat. § 14-208.7.

B. Permanent No Contact Order

[7] Finally, Defendant argues that the trial court erred when it entered a permanent no contact order preventing Defendant from contacting not only Ms. Johnson, the victim of the crime, but also her three children. The trial court's order, according to Defendant, unlawfully subjects him to potential "criminal prosecution for having contact with individuals who were not victims of the sex offense of which he was convicted." The State argues that extending the no contact order to the victim's children is permissible under N.C. Gen. Stat. § 15A-1340.50(f), which provides that when granting a permanent no contact order in sex offense cases, a

court may, *inter alia*, "[o]rder other relief deemed necessary and appropriate by the court." N.C. Gen. Stat. § 15A-1340.50(f)(7).

Under N.C. Gen. Stat. § 15A-1340.50, "[w]hen sentencing a defendant convicted of a sex offense, the judge, at the request of the district attorney, shall determine whether to issue a permanent no contact order." N.C. Gen. Stat. § 15A-1340.50(b). Following a "show cause" hearing, "the judge shall enter a finding for or against the defendant. If the judge determines that reasonable grounds exist for the victim to fear any future contact with the defendant, the judge shall issue the permanent no contact order. N.C. Gen. Stat. § 15A-1340.50(e). In making its determination, the court must "enter written findings of fact and the grounds on which the permanent no contact order is issued." *Id.* Having concluded a permanent no contact order is warranted, a court may award several forms of relief enumerated in the statute, including "other relief deemed necessary and appropriate by the court." N.C. Gen. Stat. § 15A-1340.50(f)(7).

Whether a trial court may extend a permanent no contact order under N.C. Gen. Stat. § 15A-1340.50 (*i.e.*, in the context of convicted sexual offenders specifically) beyond the individual victim appears to be a matter of first impression. In *State v. Hunt*, 221 N.C. App. 48, 56, 727 S.E.2d 584, 590 (2012), this Court held that, like satellite-based monitoring, permanent no contact orders issued in sexual offense cases constitute a civil, nonpunitive means of "protect[ing] society from recidivists." Dicta in *Hunt* suggests that this Court understood section 15A-1340.50 as applying only to the specific victim in a given case and not to a broader group of people:

> [N.C. Gen. Stat. § 15A-1340.50] only protects one citizen from the threat posed by recidivist tendencies, as opposed to all citizens of our state . . . [I]t offers protection to one who has already been victimized and is still in fear of the defendant as opposed to protecting the general population against a more unspecified threat. . . . Again, N.C. Gen. Stat. § 15A-1340.50 is specifically intended to protect a victim from sex offenders who quite frequently repeat the unlawful conduct.

Id. at 56, 727 S.E.2d at 590-91 (emphasis added). Section 15A-1340.50 addresses permanent no contact orders vis-à-vis the defendant and the victim only. A "victim" is "[t]he person against whom the sex offense was committed." N.C. Gen. Stat. § 15A-1340.50(a)(3).

The trial court here imposed a permanent no contact order against Defendant, providing: "This order includes the following individuals,"

naming the victim's three children, as an "[a]dditional necessary and appropriate restriction." The State argues that the trial court had discretion to extend the no contact order to the victim's children based on Defendant's familiarity with the children and because the children all live with the victim, the sexual offense occurred in their home, and Defendant sent a letter to one of the children threatening to harm their mother. We disagree, because the plain language of the statute limits the trial court's authority to enter a no contact order protecting anyone other than the victim.

As this Court observed in *Hunt*, N.C. Gen. Stat. § 15A-1340.50 unambiguously protects a *particular victim* of a sexual offense. It follows that a court's discretion to expand the reach of a no contact order under this section must be supported by potential risks *to the victim*, whether direct or indirect, but the order itself is directed only to the victim. N.C. Gen. Stat. §15A-1340.50 consistently and repeatedly refers only to "the victim" and not to any other person.

State v. Elder, 368 N.C. 70, 773 S.E.2d 51 (2015), is instructive in our interpretation of this statute. In *Elder*, 268 N.C. at 72, 773 S.E.2d at 53, our Supreme Court considered the scope of relief that the trial court may include in a domestic violence protective order ("DVPO") under the "catch-all" provision in N.C. Gen. Stat. § 50B-3(a)(13), which states that a protective order may "[i]nclude any additional prohibitions or requirements the court deems necessary to protect any party or any minor child." N.C. Gen. Stat. § 50B-3(a)(13). The *Elder* Court held that the word "any" did not authorize the trial court "to order law enforcement to search a defendant's person, vehicle, or residence under a DVPO." *Elder*, 368 N.C. at 72, 773 S.E.2d at 53. The Court explained that the "catch-all" provision was the last in a list of 12 other provisions which the trial court may include in the DVPO and must be interpreted consistently with the other items in the list:

> The word "any" in the catch-all provision modifies "additional prohibitions or requirements," N.C.G.S. § 50B–3(a)(13), and this provision follows a list of twelve other prohibitions or requirements that the judge may impose on a party to a DVPO, *id.* § 50B–3(a)(1)–(12). For example, the court may prohibit a party from harassing the other party or from purchasing a firearm, and it may require a party to provide housing for his or her spouse and children, to pay spousal and child support, or to complete an abuser treatment program. *Id.* § 50B–3(a)(3), (6), (7), (9), (11), (12). It

> follows, then, that the catch-all provision limits the court to ordering a party to act or refrain from acting; the provision does not authorize the court to order law enforcement, which is not a party to the civil DVPO, to proactively search defendant's person, vehicle, or residence.

Id.

In a fashion similar to the statute providing for a DVPO, N.C. Gen. Stat. § 15A-1340.50 lists seven prohibitions which the court may include in a permanent no contact order in sex offenses cases. It may:

> (1) Order the defendant not to threaten, visit, assault, molest, or otherwise interfere *with the victim*.
>
> (2) Order the defendant not to follow *the victim*, including at *the victim's* workplace.
>
> (3) Order the defendant not to harass *the victim*.
>
> (4) Order the defendant not to abuse or injure *the victim*.
>
> (5) Order the defendant not to contact *the victim* by telephone, written communication, or electronic means.
>
> (6) Order the defendant to refrain from entering or remaining present at *the victim's* residence, school, place of employment, or other specified places at times when *the victim* is present.
>
> (7) Order other relief deemed necessary and appropriate by the court.

N.C. Gen. Stat. § 15A-1340.50 (emphases added).

Reading 15A-1340.50(f) in the same manner as our Supreme Court construed a similar statute in *Elder*, we cannot adopt the broad reading urged by the State. The statute consistently addresses prohibitions of certain actions by the defendant against *the victim* and not against any other persons.

This reading of the statute may not necessarily mean that a defendant's action must be physically or literally directed to "the victim" to fall under the prohibitions of a no contact order protecting just the victim. For example, a defendant could "harass the victim" by indirect contact through her family members or even her close friends, since

> [h]arassment is defined as "knowing conduct ... directed at a specific person that torments, terrorizes, or terrifies

> that person and that serves no legitimate purpose." N.C. Gen. Stat. § 14–277.3 (2005). The plain language of the statute requires the trial court to apply only a subjective test to determine if the aggrieved party was in actual fear; no inquiry is made as to whether such fear was objectively reasonable under the circumstances.

Wornstaff v. Wornstaff, 179 N.C. App. 516, 518-19, 634 S.E.2d 567, 569 (2006).

In fact, this Court has held that contacting a victim's family members may constitute an indirect means of communicating with a victim in violation of a DVPO under Chapter 50B. In *Marshall v. Marshall*, __ N.C. App. __, __, 757 S.E.2d 319, 326 (2014), a defendant contended that a DVPO "only barred him from contacting or harassing [the victim] herself such that his admitted contact with [the victim's] friends, family, and associates was not a violation of the DVPO." This Court rejected that argument, observing that "the plain language of the DVPO bar[red] Defendant from abusing or harassing [the victim] 'by telephone, visiting the home or workplace *or other means*[.]' " *Id.* (emphasis in original). The trial court made numerous findings of fact that the defendant harassed the victim's parents, children, other family members, and friends, and concluded "these communications were indirect contacts with [the victim] specifically barred by the DVPO." *Id.*

We need not speculate all the ways in which a defendant might violate a no contact order issued under N.C. Gen. Stat. § 15A-1340.50, and if we did, we would probably fail to imagine the ingenuity of future defendants. The authority of the trial court to enter an order under the statute is limited to prohibiting actions by the defendant against "the victim" based on the plain language of the statute. Accordingly, the trial court did not have authority under the catch-all provision to enter a no contact order specifically including persons who were not "victims" of the "sex offense" committed by Defendant, *see* N.C. Gen. Stat. § 15A-1340.50(a)(2) and (3), and that portion of the no contact order identifying the victim's children must be vacated.

Conclusion

Based on the foregoing reasons, we conclude that Defendant received a trial free of error. However, we reverse the trial court's lifetime SBM order, reverse and remand the lifetime sex offender registration order for entry of a new order requiring registration for a period of thirty years, and we vacate and remand the permanent no contact

order so the trial court may remove mention of any individuals other than the victim.

NO ERROR IN TRIAL; SBM ORDER REVERSED; REGISTRATION ORDER REVERSED AND REMANDED; PERMANENT NO CONTACT ORDER VACATED AND REMANDED.

Judges CALABRIA and STROUD concur.

STATE OF NORTH CAROLINA
v.
CECIL JACKSON TRAVIS, III

No. COA15-413

Filed 19 January 2016

1. Search and Seizure—traffic stop—probable cause

The trial court's findings of fact supported its conclusion that reasonable suspicion existed to stop defendant's vehicle in an opioid possession prosecution, although it was a close case because the observed transaction was in broad daylight in an area not known for drug activity and defendant did not display signs of nervousness. Defendant was known to the trained and experienced vice officer who observed the transaction from having been an informant when the vice officer observed defendant and the occupant of another vehicle conducted a hand-to-hand transaction without leaving their vehicles.

2. Appeal and Error—findings—recitation of testimony—no material conflict

While the defendant argued on appeal in an opioid possession prosecution that some of the trial court's findings when denying a motion to suppress were merely recitations of testimony, recitations of testimony are only insufficient when a material conflict actually exists on a particular issue.

Appeal by defendant from judgment entered 29 October 2014 by Judge A. Robinson Hassell in Alamance County Superior Court. Heard in the Court of Appeals 7 October 2015.

Roy Cooper, *Attorney General*, *by Thomas J. Campbell*, *Assistant Attorney General*, *for the State.*

Leslie Rawls for defendant-appellant.

DAVIS, Judge.

Cecil Jackson Travis, III ("Defendant") appeals from the judgment entered upon his convictions of possession of drug paraphernalia, simple possession of a Schedule IV controlled substance, and possession with intent to manufacture, sell, or deliver a Schedule II controlled substance. On appeal, he contends that the trial court erred by denying his motion to suppress. After careful review, we affirm.

Factual Background

On 8 May 2013 at around 2:00 p.m., Officer Chris Header ("Officer Header"), a vice narcotics officer with the Mebane Police Department, was in his unmarked patrol vehicle in the parking lot of a post office in downtown Mebane, North Carolina. From his vehicle, he observed a van being driven by Defendant pull into the parking lot. Officer Header knew Defendant as he had previously worked for Officer Header as an informant and had "purchased narcotics for [him] . . . in a controlled capacity." Officer Header then observed the following:

> [Defendant] pulled up to a [sic] passenger side of a maroon SUV. . . . [T]he passenger . . . of the [SUV] roll[ed] down its window. [Defendant] had his window down and they both reached out and appeared to exchange something. And just after the exchange they both returned their arms to the vehicle[s] and then immediately left. So they were there less than a minute.

Based on his training and experience as a vice narcotics officer, Officer Header believed he had witnessed a "[h]and-to-hand" drug transaction in which "narcotics had been traded for money." As a result, he sent out a request over his radio for any nearby patrol officer to stop Defendant's vehicle.

Lieutenant Jeremiah Richardson ("Lt. Richardson") was in his office at the police station in downtown Mebane when he heard Officer Header's request over his radio. In response, he left his office, got into his patrol vehicle, and began backing out of the station parking lot. As he was doing so, he observed Defendant's van drive past him.

Lt. Richardson pursued Defendant's vehicle and ultimately initiated a traffic stop of the van. A subsequent search of the vehicle led to the discovery of drug paraphernalia, less than half an ounce of marijuana, and 26 oxycodone pills. As a result, Defendant was placed under arrest.

On 27 May 2014, Defendant was indicted for (1) possession of drug paraphernalia; (2) simple possession of a Schedule IV controlled substance; and (3) possession with intent to manufacture, sell, or deliver a Schedule II controlled substance. On 27 October 2014, Defendant filed a motion to suppress all evidence obtained as a result of the traffic stop based on his assertion that no reasonable suspicion existed to justify the stop of his vehicle.

A hearing on Defendant's motion to suppress was held on 29 October 2014 before the Honorable A. Robinson Hassell. At the hearing, the State presented the testimony of Officer Header and Lt. Richardson. Defendant did not offer any evidence.

After considering the State's evidence and the arguments of counsel, the trial court denied Defendant's motion. A brief recess was taken during which Defendant entered into a plea agreement with the State, reserving his right to appeal the trial court's denial of his motion to suppress. Upon resumption of the proceedings, Defendant pled guilty to the charges against him and was sentenced to 5-15 months imprisonment. The sentence was suspended, and Defendant was placed on 24 months supervised probation. Defendant gave oral notice of appeal in open court.

Analysis

I. Reasonable Suspicion

[1] Defendant's first argument on appeal is that his motion to suppress was improperly denied based on a lack of reasonable suspicion to justify the investigatory stop of his vehicle. "When a motion to suppress is denied, this Court employs a two-part standard of review on appeal: The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015) (citation and quotation marks omitted).

It is well established that

> [t]he Fourth Amendment protects the right of the people against unreasonable searches and seizures. It is

> applicable to the states through the Due Process Clause of the Fourteenth Amendment. It applies to seizures of the person, including brief investigatory detentions such as those involved in the stopping of a vehicle.
>
> Only unreasonable investigatory stops are unconstitutional. An investigatory stop must be justified by a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.
>
> A court must consider the totality of the circumstances — the whole picture in determining whether a reasonable suspicion to make an investigatory stop exists. The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. The only requirement is a minimal level of objective justification, something more than an unparticularized suspicion or hunch.

State v. Watkins, 337 N.C. 437, 441-42, 446 S.E.2d 67, 69-70 (1994) (internal citations, quotation marks, and ellipses omitted); *see State v. Watson*, 119 N.C. App. 395, 398, 458 S.E.2d 519, 522 (1995) ("[A]n officer's experience and training can create reasonable suspicion. Defendant's actions must be viewed through the officer's eyes.").

In the present case, the trial court's order contained the following findings of fact:

> 1. The State presented two witnesses in this matter, Investigator Chris Header, Mebane Police Department and Lieutenant Jeremiah Richardson, Mebane Police Department.
>
> 2. That on May 8, 2013 at 2:00 P.M. Officer Header, Mebane Police Officer, was sitting in a stationary, unmarked vehicle and was a member of the vice/narcotics unit.
>
> 3. That this officer was in a position to observe conduct from a suspect known subjectively to him, and by him, as someone that he had worked with in controlled buys and as someone who had worked for him as an informant involving marijuana and other controlled substances.
>
> 4. That Officer Header testified as to familiarity with the defendant's residence and the vehicle or vehicles used by him or members of his family.

5. That the van the defendant occupied on this occasion was recognized by this officer as being one from the defendant's family member.

6. That the officer observed the defendant drive up in this van and park along the passenger side of a maroon sport utility vehicle.

7. That the officer observed arms from each vehicle, including one arm of the defendant, extending to one another and touch hands, without further specificity as to the nature of the transactions.

8. That the officer acknowledged his training and experience of more than five years combined between the Mebane Police Department and the Orange County Sheriff's Department.

9. That the officer testified that in his training and experience, this appeared to be a hand to hand transaction in exchange for controlled substances.

10. That the officer testified that after this hand to hand transaction, both the defendant in his vehicle and the maroon sport utility vehicle each drove off.

11. That there was no testimony or evidence presented that the occupants of either vehicle had gone into or went into the post office at which they were located.

12. That Officer Header, thereafter, reported the transaction and requested assistance to stop the defendant, describing the vehicle he observed the defendant operating and the direction from which he had gone and appeared to be traveling.

13. That Lieutenant Richardson further testified additionally that while in his office at the Mebane Police Department he received the call in [sic] of Officer Header, for whom he had been a supervisor while overseeing the criminal investigative division of the Mebane Police Department.

14. That Lieutenant Richardson testified to his visual confirmation of the vehicle as described by Officer Header and the occupant described, as well.

15. That Lieutenant Richardson testified as to independent knowledge of the defendant as well as the vehicle confirming his visual recognition of each.

16. That both officers testified that no traffic violations appeared to have occurred in their presence to otherwise formulate the basis of the stop.

17. That both officers testified to their knowledge that the public area of federal property of the post office in Mebane, North Carolina, in the downtown area, was not known to be a crime area, but was known to be a public area where vehicles would come and go.

18. That after about two-tenths of a mile the Lieutenant, having entered his vehicle to follow the defendant, stopped the defendant's vehicle.

The trial court then made the following conclusions of law:

1. That based upon the totality of the circumstances, the prior knowledge, particularly of Officer Header in working with this defendant and the vehicle, the fact that this defendant was known to both officers, as well as the vehicle operated by him, the officers' training and experience, specifically Officer Header's, with respect to undercover narcotics activity, investigative techniques, and observations in the field and otherwise, the officers were in a position to recognize on their belief (sic) and suspect when criminal activity appears before them or appears to have occurred.

2. That based upon the totality of the circumstances, under these circumstances, the suspicions of criminal activity articulated by the officers on this occasion were objectively reasonable.

While this is a close case, we believe the trial court's findings of fact support its conclusion that reasonable suspicion existed to stop Defendant's vehicle. Officer Header recognized Defendant as one of his former informants who had previously engaged in controlled purchases of drugs for him. He observed Defendant pull into the post office parking lot and park in a space next to the passenger side of a maroon SUV and then saw "arms from each vehicle, including one arm of the defendant, extending to one another and touch hands . . . ." Both vehicles then

drove off without the occupants of the two vehicles ever having actually gone into the post office. Based on his training and experience as a law enforcement officer for more than five years, Officer Header believed this to be a hand-to-hand transaction in which controlled substances had been exchanged.

On several prior occasions, we have held that reasonable suspicion existed to support an investigatory stop where law enforcement officers witnessed acts that they believed to be transactions involving the sale of illegal drugs. *See State v. Mello*, 200 N.C. App. 437, 438, 684 S.E.2d 483, 485 (2009) (based on officer's training and experience, he believed he had witnessed hand-to-hand controlled substance transaction where two individuals in area known for illegal drug activity "approach[ed] the [defendant's] vehicle putting their hands into the vehicle"), *aff'd per curiam*, 364 N.C. 421, 700 S.E.2d 224 (2010); *State v. Carmon*, 156 N.C. App. 235, 240-41, 576 S.E.2d 730, 735 (reasonable suspicion existed to conduct investigatory stop where (1) officer observed defendant in grocery store parking lot "receive a softball-size package from a man in a conspicuous car at night"; (2) defendant "appeared to be nervous"; and (3) officer's "past experience in observing drug transactions" led him to believe a drug transaction had occurred), *aff'd per curiam*, 357 N.C. 500, 586 S.E.2d 90 (2003); *State v. Summey*, 150 N.C. App. 662, 664-67, 564 S.E.2d 624, 626-28 (2002) (officer conducting surveillance of residence in area known for past drug activity had reasonable suspicion for investigatory stop after observing "a course of conduct which was characteristic of a drug transaction"; officer saw defendant's truck pull up to house and man from house approach and "appear[ ] to engage in a brief conversation with the driver . . . [and a] few moments later, the man returned to the yard and the truck drove away"); *State v. Clyburn*, 120 N.C. App. 377, 378-81, 462 S.E.2d 538, 539-41 (1995) (officer conducting surveillance during evening in area of known drug activity had reasonable suspicion based on his training and experience to conduct investigatory stop of defendant where officer observed defendant and other individuals meet briefly behind vacant duplex and officer "was of the opinion that he had observed a hand-to-hand drug transaction").

Admittedly, as Defendant notes, the present incident took place in broad daylight in the parking lot of a public building rather than in an area known for drug activity (as in *Mello*, *Summey*, and *Clyburn*) or at night (as in *Carmon* and *Clyburn*). Moreover, there is no indication that Defendant was even aware of Officer Header's presence much less that he displayed signs of nervousness or took evasive action to avoid Officer Header. However, while courts making a determination of whether

reasonable suspicion existed to justify an investigative stop may certainly take into account factors such as past criminal activity in the area, time of day, and nervousness or evasive action by the defendant, none of these individual circumstances are indispensable to a conclusion that an investigatory stop was lawful. Rather, courts must consider the totality of the circumstances of each case.

> Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence. Only some minimal level of objective justification is required. This Court has determined that the reasonable suspicion standard requires that the stop be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. Moreover, a court must consider the totality of the circumstances — the whole picture in determining whether a reasonable suspicion exists.

State v. Barnard, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (internal citation, quotation marks, brackets, and ellipses omitted), *cert. denied*, 555 U.S. 914, 172 L.Ed.2d 198 (2008).

"This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person. While something more than a mere hunch is required, the reasonable suspicion standard demands less than probable cause and considerably less than preponderance of the evidence." *State v. Williams*, 366 N.C. 110, 116-17, 726 S.E.2d 161, 167 (2012) (internal citations and quotation marks omitted).

The actions of Defendant and the occupant of the maroon SUV may or may not have appeared suspicious to a layperson. But they were sufficient to permit a reasonable inference by a trained law enforcement officer such as Officer Header that a hand-to-hand transaction of an illegal substance had occurred. Moreover, Officer Header knew Defendant and recognized his vehicle, having had past experience with him as an informant in connection with controlled drug transactions. *See id.* at 117, 726 S.E.2d at 167 ("Viewed individually and in isolation, any of these facts might not support a reasonable suspicion of criminal activity. But viewed as a whole by a trained law enforcement officer who is familiar with drug trafficking . . . the responses [of the defendant's accomplice]

were sufficient to provoke a reasonable articulable suspicion that criminal activity was afoot . . . ." (citation, quotation marks, and ellipses omitted)). While we recognize that a number of entirely innocent explanations could exist for the conduct observed by Officer Header, that fact alone does not necessarily preclude a finding of reasonable suspicion. *See id.* ("A determination that reasonable suspicion exists need not rule out the possibility of innocent conduct." (citation, quotation marks, and ellipses omitted)).

In sum, on these facts we cannot say that the determination made by Officer Header based on the conduct he observed in accordance with his training and experience failed to rise beyond the level of an unparticularized suspicion or a mere hunch. Accordingly, the trial court did not err in finding that based upon the totality of the circumstances reasonable suspicion existed to stop Defendant's vehicle.

II. Findings of Fact

[2] In his final argument, Defendant asserts that several of the findings of fact made by the trial court were merely recitations of testimony by the State's witnesses. Specifically, he contends that because findings of fact 4, 9, 10, 13, 14, 15, 16, and 17 simply recite the testimony of Officer Header and Lt. Richardson they are not proper "findings" sufficient to support the trial court's conclusions of law. Defendant is correct as a general proposition that "[a]lthough . . . recitations of testimony may properly be included in an order denying suppression, they cannot substitute for findings of fact resolving material conflicts." *State v. Lang*, 309 N.C. 512, 520, 308 S.E.2d 317, 321 (1983). The flaw in Defendant's argument, however, is that such recitation of testimony is insufficient only where a material conflict actually exists on that particular issue.

> [The defendant] argues that to the extent findings of fact 4, 6, and 8 summarize defendant's testimony, they are not proper findings of fact because they are mere recitations of testimony, citing *Long v. Long*, 160 N.C. App. 664, 588 S.E.2d 1 (2003), and *Chloride, Inc. v. Honeycutt*, 71 N.C. App. 805, 323 S.E.2d 368 (1984). In those cases, the findings were inadequate because the trial court did not, with a mere recitation of testimony, resolve the conflicts in the evidence and actually find facts. That is not, however, the case here.

Praver v. Raus, 220 N.C. App. 88, 92, 725 S.E.2d 379, 382 (2012) (select internal citation omitted).

Indeed, where there is no material conflict in the evidence as to a certain fact, the trial court is not required to make any finding at all as to that fact. *See State v. Smith*, 135 N.C. App. 377, 380, 520 S.E.2d 310, 312 (1999) ("After conducting a hearing on a motion to suppress, a trial court should make findings of fact that will support its conclusions as to whether the evidence is admissible. If there is no conflict in the evidence on a fact, failure to find that fact is not error. Its finding is implied from the ruling of the court." (citation and quotation marks omitted)).

Here, Defendant has not referred us to the existence of any material conflicts in the evidence concerning the recited testimony set out in findings 4, 9, 10, 13, 14, 15, 16, or 17. *See State v. Baker*, 208 N.C. App. 376, 384, 702 S.E.2d 825, 831 (2010) ("[W]e hold that, for purposes of [a motion to suppress], a material conflict in the evidence exists when evidence presented by one party controverts evidence presented by an opposing party such that the outcome of the matter to be decided is likely to be affected."). Therefore, Defendant's argument on this issue is overruled.[1]

Conclusion

For the reasons stated above, we affirm the trial court's order denying Defendant's motion to suppress.

AFFIRMED.

Judges STEPHENS and STROUD concur.

1. We do, however, take this opportunity to remind the trial courts of this State that even with regard to undisputed facts the better practice when entering a written order ruling on a motion to suppress is to make actual findings based on the testimony of witnesses rather than merely reciting the testimony of those witnesses.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 JANUARY 2016)

EPLEY v. INGBER No. 15-378	Mecklenburg (14CVD3636)	Affirmed
IN RE A.L.S. No. 15-824	Carteret (09JT51-53)	Affirmed
IN RE A.P.H. No. 15-678	Rutherford (15JA12)	Affirmed
IN RE B.M.A. No. 15-787	Transylvania (14JT22)	Vacated and Remanded
IN RE D.D. No. 15-786	Robeson (14JA82)	Vacated and Remanded
IN RE D.N.M.G. No. 15-789	Guilford (09JT261) (10JT13)	Affirmed
IN RE D.S. No. 15-788	Forsyth (12JT05-08)	Affirmed
IN RE D.S.S. No. 15-844	Guilford (11JT406) (13JT87)	Affirmed
IN RE D.T. No. 15-705	Orange (12JT93-95)	Affirmed
IN RE L.D.W. No. 15-423	Henderson (11JT149)	Affirmed
IN RE L.J.M. No. 15-698	Robeson (13JT379)	Reversed
IN RE Q.C.R. No. 15-504	Wayne (11JT108) (12JT15)	DISMISSED IN PART; AFFIRMED IN PART
IN RE T.C.K No. 15-580	Carteret (11JT52)	Affirmed
IN RE T.D.V. No. 15-929	Guilford (12JT40) (13JT88)	Affirmed

IN RE T.H. No. 15-866	Union (15JA51) (15JA52)	Affirmed
IN RE Z.A.A. No. 15-712	New Hanover (12JT246)	Affirmed
KELLEY v. ANDREWS No. 15-448	Durham (13CVS5618)	Vacated and Remanded
LUCAS & BEACH, INC. v. AGRI-E. GRP., INC. No. 15-463	Martin (12CVS508)	Affirmed
MUSSEN v. STATE OF N.C. No. 15-749	Wake (14CVS10529)	Dismissed
N.C. DEP'T OF PUB. SAFETY v. SHIELDS No. 15-154	Nash (14CVS342)	Affirmed
STATE v. AINE No. 15-490	Cumberland (12CRS58306)	No Error
STATE v. BENJAMIN No. 15-485	Cleveland (13CRS2085-86) (13CRS53300)	No Error
STATE v. COOLEY No. 15-352	Wake (12CRS204986) (12CRS204987)	No error in part; dismissed in part
STATE v. DUBOISE No. 15-852	Union (13CRS54135-38)	No Error
STATE v. HATCH No. 15-197	Durham (13CRS59675)	Affirmed
STATE v. McCLELLAND No. 15-344	Rowan (14CRS53057)	No Error
STATE v. McKINNON No. 15-650	Wayne (11CRS54848)	Vacated and remanded for entry of new sentencing judgments
STATE v. McLEAN No. 15-513	Lincoln (11CRS53550-51) (11CRS53555) (11CRS53557)	No Error

STATE v. RADER No. 15-192	Forsyth (12CRS53474) (12CRS53539)	No Error
STATE v. SMALLS No. 15-440	Johnston (13CRS56990)	No Error
STATE v. SUMO No. 15-447	Mecklenburg (13CRS204343-44)	No Error
STATE v. THOMSON No. 15-390	Haywood (13CRS502-507)	No Error
STATE v. WATSON No. 15-715	Hertford (13CRS52090) (14CRS610)	Affirmed
UNDERWOOD v. ORDONEZ No. 15-455	Wake (14CVS6563)	Reversed

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